Central Law Journal.

ST. LOUIS, MO., OCTOBER 16, 1896.

The case of Bell v. Bell, recently decided by the Supreme Court of New York, though purely local in its application, will have considerable weight with courts of other States in the determination of the question as to the validity of foreign divorces. The action in that case was for divorce and it was held that no bar existed thereto, by reason of a prior adjudication in a court of Pennsylvania purporting to be one for divorce between the same parties, in which the present plaintiff was named as defendant. It was held that, the present plaintiff not having been served with process in Pennsylvania and not having appeared in the Pennsylvania action, and neither party having been a resident of Pennsylvania, but defendant having gone there for the sole purpose of bringing the former suit, the former judgment might be ignored, and, upon proper grounds, the marriage relation might be dissolved in New York. The opinion of the court collates many New York authorities on the subject.

The decision of a judge of the Circuit Court of Illinois has excited considerable comment because of the holding, which is claimed to be novel, that a husband has a right to alimony and solicitors' fees. There is nothing unwarranted under the facts of that case in such a decision, though, naturally, there is little authority to be found for it. The great change in the law pertaining to modern domestic relations renders such a conclusion logical and tenable. As the court says, if the law which gives the wife alimony, support and attorneys' fees pending the determination of her suit for divorce in a case where she is without fault, "is good law in behalf of the wife, why not in behalf of the husband?" To use a trite old phrase "what is sauce for the goose is sauce for the gander."

The *London Solicitors Journal* depreciates the increasing practice of citing American reports in the English courts, and has this to say on the subject, which applies with equal force to the now decreasing practice of citing English cases in the courts of this country. "The American reports have this month attained the dignity of a place in a head note of the law reports. The head note to Kennedy v. Trafford, 1896, 1 Ch. 763, says: 'Van Horne v. Fondu, 5 Johns. Ch. (N. Y.) 388, not followed.' A decision of Chancellor Kent is cited as authority to the English Court of Appeal, and is not followed. Why not? Because in spite of the great attainments, judgment and skill in the application of principles of Chancellor Kent, the English Court of Appeal did know how far the law of the State of New York and the law of England were alike in these matters. And surely it is not their business to know. It is quite bad enough to cite foreign decisions *arguendo* and by way of analogy, unless the foreign law is proved as a fact; the citation is even then fairly useless. But the citation of such foreign decisions as authorities in an English court should be repressed with severity as both dangerous and misleading. On this point we cannot do better than recall the strong remark of Lord Halsbury and Cotton and Fry, L. JJ., *In re* Missouri Steamship Co., 42 Ch. Div. 321, 330. On counsel proceeding to read the judgment of the Supreme Court of the United States in the Montana case, Lord Halsbury, C., said: "We should treat with great respect the opinion of eminent American lawyers on points which arise before us, but the practice, which seems to be increasing, of quoting American decisions as authorities, in the same way as if they were decisions in our own courts, is wrong. Among other things, it involves an inquiry, which often is not an easy one, whether the law of America on the subject on which the point arises in the same as our own." Fry, L. J., said: "I also have been struck by the waste of time occasioned by the growing practice of citing American authorities." And Cotton, L. J., added: "I have often protested against the citation of American authorities." If the practice gets thoroughly established we shall soon have counsel contending that a well-considered decision of an English judge was wrong because some out-of-the-way American case was not cited to him or that another case has been overruled by an American court. We have such an abundance of case law on every subject in our own reports, that principle has very seldom an opportunity of

coming to the front. When, however, that case does arise, for the law's sake, do not let us allow English principle to be stifled by foreign competition."

NOTES OF RECENT DECISIONS.

CRIMINAL LAW — VERDICT—ABSENCE OF DEFENDANT.—The Supreme Court of Florida, in the case of Summersell v. State, 20 South. Rep. 242, following the invariable rule that no legal sentence can be pronounced in a felony case upon a verdict rendered and received by the court during the absence of defendant, held that when defendant in such a case voluntarily absconds while the jury are out considering their verdict, the proper practice is for the judge to declare a mistrial and discharge the jury, without receiving any verdict, after he becomes satisfied that the defendant cannot be produced within a reasonable time; and that if, after defendant in a felony case absconds, a verdict of guilty is received and the jury discharged during his absence, and sentence pronounced thereon by the court at a subsequent term, the verdict and sentence are mere nullities.

LIEN—LABORER'S LIEN—CLERK.—Whether a clerk is a laborer, within the meaning of statutes giving a lien to the latter or exempting their wages from garnishment, is a question of considerable importance, in reference to which some confusion has arisen in the decisions of the courts. The Supreme Court of Georgia lately considered it in Oliver v. Macon Hardware Co., 25 S. E. Rep. 403, holding that primarily a clerk in a mercantile establishment is not a laborer in the sense which that word is used in the Code, even though the proper discharge of his duties may include the performance of some amount of manual labor. If the contract of employment contemplated that the clerk's services were to consist mainly of work requiring mental skill or business capacity, and involving the exercise of his intellectual faculties, rather than work, the doing of which properly would depend upon mere physical power to perform ordinary manual labor, he would not be a laborer. If, on the other hand, the work which the contract required the clerk to do was, in the main, to be the performance of such labor as that last above indicated, he would be a laborer. In any given case, the question whether or not a clerk is entitled, as a laborer, to enfore a summary lien against the property of his employer, must be determined with reference to its own particular facts and circumstances.

FEDERAL OFFENSE—UNLAWFUL USE OF MAILS—LOTTERY.—In United States v. Fulkerson, 74 Fed. Rep. 619, decided by the United States District Court for the Southern District of California, the defendants conducted a business, the essential features of which were as follows: In consideration of a membership fee of $5.00 and monthly dues of $2, it entered into contracts with persons who desired to become members, purporting to be contracts of indemnity in case of sickness, accident, or death, and issued to them certificates, containing the usual provisions of similar insurance policies. To each such certificate were attached 50 coupons of $10 each, which were numbered consecutively, those on the first certificate issued ruuning from 1 to 50, those on the second certificate issued from 51 to 100, and so on, indefinitely. The certificates were issued in the order in which applications were received, by mail or otherwise, and there was no means of knowing, prior to the issue of a certificate, how many had been issued previously, nor what would be the numbers of the coupons to be attached to it. It was provided that one-half of the amounts received from monthly dues should be placed in a so-called "Maturity Fund," and that, whenever there should be sufficient money in said fund to pay one or more coupons, such number of coupons should be paid, and that the coupons to be paid should be determined by taking, first, the coupon numbered 1, then that numbered 5, and so on, in a geometrical progression, with the ratio 5, until the series reached the highest numbered coupon sold; then taking that numbered 2, then 10, etc., in a second series, with the ratio 5, and so on, until the numbers of all the coupons sold should be included in some series. It was also provided that, at the end of 3 years, each certificate holder should receive the full amount paid in monthly dues; at the end of 5 years, $150; at the end of 7 years $300; and at the end of 10 years $500—

but the only resources to provide for such payments were the membership fees, and certain inconsiderable portions of the monthly dues; the remainder of such dues, after providing for the maturity fund, being devoted to an expense fund, and a sick, accident and death fund. It was held that this scheme was a lottery within the meaning of Rev. St. § 3894. The court said that the scheme was, in many respects, similar to that in the case of U. S. v. McDonald, 12 C. C. A. 339, which was unqualifiedly condemned by the court.

CONTRACT—CONSIDERATION.—The Supreme Court of North Dakota, in Gaar, Scott & Co. v. Green, 68 N. W. Rep. 318, applies the doctrine that where a party is legally bound by contract to execute certain papers, but refuse to do so unless the other party to the contract will enter further agreements and promises, such further agreements and promises are without consideration, and impose no liabilities. It appears that A purchased machinery of B by written contract, in which he agreed to execute certain notes therefor. After receiving the machinery, he refused to execute the notes unless the vendor would agree to do certain things about the machinery not embraced in the original contract. This the vendor promised to do. It was held that such promise was without consideration, and that collection of the notes could be enforced without showing compliance therewith. The court says in part:

On this testimony, each party moved for a directed verdict. Appellant's motion was denied, and respondents' granted. We think this was error. It is perhaps true, as urged by respondents, that the maker of a note may place the same in the hands of the payee, and such delivery be so far conditional that no liability upon the notes in the hands of the payee will arise until the specified conditions are performed. Benton v. Martin, 52 N. Y. 570; Reynolds v. Robinson, 110 N. Y. 654, 18 N. E. Rep. 127; Bank v. Luckow, 37 Minn. 542, 35 N. W. Rep. 434; McFarland v. Sikes, 54 Conn. 250, 7 Atl. Rep. 408; Bank v. Bornman, 124 Ill. 265, 16 N. E. Rep. 210. And this conditional delivery may be shown by parol. Such evidence has no tendency to vary or contradict the terms of the written instrument. It only shows that the terms of the instrument never became obligatory. Ware v. Allen, 128 U. S. 591, 9 Sup. Ct. Rep. 174; Burke v. Dulaney, 153 U. S. 228, 14 Sup. Ct. Rep. 816. It may also be true (but we do not decide the point) that if the subsequent contract to which J. K. Green testifies was based upon a sufficient consideration, and if the notes in suit were given by reason of such subsequent promise, and would not have been given otherwise, plaintiff, in seeking to enforce such notes, ratifies such subsequent promise, and cannot be heard to say that it was unauthorized. On this point, see Churchill v. Palmer, 115 Mass. 310; Melby v. Osborne, 33 Minn. 492, 24 N. W. Rep. 253; Culver v. Ashley, 19 Pick. 300; Ellwell v. Chamberlin, 31 N. Y. 611-619; Meehan v. Forrester, 52 N. Y. 277; Mundorff v. Wickersham, 63 Pa. St. 87; Saving Fund Assn. v. Fire Ins. Co., 16 Iowa, 74; Eadie v. Ashbaugh, 44 Iowa, 519.

But respondents are not in a position on this record to avail themselves of these principles. J. K. Green bought the machine under a written contract, which included a warranty on the part of the vendor. By the terms of that warranty, he agreed that, in case said machine, or any of its parts, failed to operate as warranted within six days after its first use, he would give written notice of the defect to the home office of the vendor, and also written notice to the agent from whom the machine was purchased, to the end that efforts might be made to remedy the defects, and, if not remedied, the defective machine, or part must be returned to the place where received. He further agreed that use of said machine after the expiration of the six days should be evidence of the fulfillment of the warranty, and that he would thereafter make no other claim upon the vendors. The improvidence of such a contract as applied to threshing machinery is most glaring. It cannot be tested until the crop is ready for threshing, and, once that time arrives, delays are so dangerous and expensive, time is of such importance, that the farmer will take great risks on the machinery, rather than cease work. The practical result is that in case of defective machinery the vendors can generally avoid liability on the warranty by reason of some default on the part of the vendee. But, while parties continue to make such contracts, courts must continue to enforce them. It does not appear in this case that any written notice of defects was ever given to the home office or the local office. We have held that this was absolutely necessary. See Fahey v. Machine Co., 3 N. D. 220, 55 N. W. Rep. 580. It does not appear that the machine, or any part thereof, was ever returned, or any offer made to return the same. It does conclusively appear that the machine had been used for 12 days at the time the notes were given. Under these circumstances, the respondents were in no condition to claim defects in the machine. It stood as to them as completely fulfilling the warranty. J. K. Green had agreed to give the identical notes and mortgage that he did give. The consideration for that promise was the sale of the machine which he had in his possession when he gave the notes. That consideration was exhausted, and he had no legal right to insist upon any other terms or contract upon the part of the vendors; and any such further contract, if given, was without consideration, and imposed no obligation. True, he might have refused to execute the notes, but he could only have done so on condition of incurring liability for all damages resulting from such refusal, and this the law regards as the equivalent of performance. As fully sustaining these views we cite, without quoting therefrom, the following well-considered cases: Conover v. Stillwell, 34 N. J. Law, 54; Geer v. Archer, 2 Barb. 420; Ayres v. Railroad Co., 52 Iowa, 478, 3 N. W. Rep. 522; Reynolds v. Nugent, 25 Ind. 328; Furnace Co. v. French, 34 How. Prac. 94; Vanderbilt v. Schreyer, 91 N. Y. 392; Festerman v. Parker, 10 Ired. 474.

RAILROAD COMPANY—CARRIERS OF PASSENGERS—INJURY TO EMPLOYEE RIDING AS PASSENGER—EXEMPTION FROM LIABILITY.—The

Supreme Judicial Court of Massachusetts decides, in Doyle v. Fitchburg R. Co., that an employee riding on its train as a passenger is not a free passenger, though his ticket is such as the company issues only to its employees working in Boston and living at some other place on its line; and that a railroad company cannot by contract with a passenger whose ticket is not a gratuity exempt itself from liability for its negligence. The court says:

The ticket was only given to employees and not to all of those, but, so far as appears, only to such as worked in Boston, and lived, on the line of the railroad, in some other place. It had reference, therefore, to special circumstances attending the performance of services for the company, and the arrangement well may have been regarded as mutually advantageous. By it the defendant was enabled to obtain the services of those who did not live in Boston, and thus to draw its employees from a larger body, subject only to the expense of their transportation; and the plaintiff's intestate was enabled to enter the defendant's employment on equal terms, as to wages, with those living in Boston. Without speculating as to what the rights of the plaintiff's intestate to the ticket would have been if at any time he had left the defendant's employment before the end of the month, we think it plain, as already stated, that, as this case stands, the ticket properly cannot be regarded as a gratuity.

The defendant contends, however, that, even if the plaintiff's intestate was not a free passenger, the plaintiff cannot recover, because of the stipulation on the back of the ticket, to which the plaintiff's intestate must be presumed, by accepting the ticket, to have assented. In this respect this case raises a question which it was not found necessary to decide in the former case, and which does not appear to have been directly decided in this commonwealth. We assume that if the ticket had been a gratuity the contract on the back of it would have precluded a recovery, and that it would have made no difference that the negligence was gross. Quimby v. Railroad Co., 150 Mass. 365, 23 N. E. Rep. 205; Rogers v. Steamboat Co., 86 Me. 261, 29 Atl. Rep. 1069; Griswold v. Railroad Co., 53 Conn. 371, 4 Atl. Rep. 261. How far common carriers may go in contracting to be relieved from the consequences of their own negligence and that of their servants is a matter on which different courts have their different views, and on which, in some instances, courts within the same jurisdiction have expressed themselves differently at different times. It is clear that they have not an unlimited power of contract in that respect. A private individual may refuse to transport a person from one place to another unless the latter will agree to assume all risk of injury. But a railroad corporation would have no right to insist, as a condition of carrying a passenger, that he should make such a contract. This arises out of the nature of the service which they undertake. They may prescribe rates of fare, and reasonable regulations for the safety of passengers and the conduct of the business in which they are engaged; but, if the passenger is willing to conform to them, they cannot insist that he shall accept the risk of accident, as a condition of being carried. But the question now is, what is the effect of such a contract voluntarily entered into by a passenger who in other respects occupies the position of a passenger for hire? There is a *dictum* in this State to the effect that such a contract would not relieve a railroad company from liability for injuries caused by its own negligence or that of its servants. Quimby v. Railroad Co., 150 Mass. 371, 23 N. E. Rep. 205. And we think that it must be regarded as settled in this commonwealth that such a contract in regard to the carriage of goods would not exempt a railroad from liability for its own negligence, or that of its servants. School Dist. in Medfield v. Boston H. E. R. Co., 102 Mass. 552, 556; Squire v. Railroad Co., 98 Mass. 239, 246; Fonseca v. Steamship Co., 153 Mass. 553, 557, 27 N. E. Rep. 665; Hoadley v. Transportation Co., 115 Mass. 304; Grace v. Adams, 100 Mass. 505. Although the liability of a carrier of merchandise is that of an insurer, and the liability of a carrier of passengers is measured by the highest degree of care which human foresight reasonably will admit of, we see no valid reason for holding that in the former case the carrier cannot be exempted from his own negligence, and that in the latter he may. The object in both cases, as is said in Railroad Co. v. Lockwood, 17 Wall. 357, 377, 378, is to secure the utmost fidelity and care in the performance of their respective duties; and this object, in the case of the passenger carrier as in that of the merchandise carrier, can be accomplished more satisfactorily by denying them the right to contract for exemption from liability for their own negligence and that of their servants than in any other mode. The powerful and dangerous agencies usually employed, the absolute control of them which they have, the trust necessarily reposed in them, the compulsion which they might otherwise exercise, and the public nature of their service under the rule, we think just and reasonable. The law in England and in some of the States here is otherwise, but the great weight of authority in this country is against the right of a common carrier to contract for exemption from the consequences of its own negligence, or that of its servants. Railway Co. v. Stevens, 95 U. S. 655; Railroad Co. v. Lockwood, 17 Wall. 357; Railway Co. v. Selby, 47 Ind. 471; Rose v. Railroad Co., 39 Iowa, 246; Railroad Co. v. Curran, 19 Ohio St. 1; Annas v. Railroad Co., 67 Wis. 46, 30 N. W. Rep. 282; Railroad Co. v. Henderson, 51 Pa. St. 315; Jacobus v. Railroad Co., 20 Minn. 125 (Gil. 110); Railroad Co. v. Ivey, 71 Tex. 409, 9 S. W. Rep. 346; Carroll v. Railway Co., 88 Mo. 239; Willis v. Railway Co., 62 Me. 488; Flinn v. Railroad Co., 1 Houst. (Del.) 469, 501, 502; Railroad Co. v. Simpson, 30 Kan. 645, 2 Pac. Rep. 831; Railroad Co. v. Hopkins, 41 Ala. 486; Railroad Co. v. Wynn, 88 Tenn. 330, 14 S. W. Rep. 311; Maslin v. Railroad Co., 14 W. Va. 180; Railroad Co. v. Sayers, 26 Gratt. 328; Orndorff v. Express Co., 3 Bush, 194; Taylor v. Railroad Co., 39 Ark. 148; Berry v. Cooper, 28 Ga. 543; Express Co. v. Moon, 39 Miss. 822; 3 Wood, Ry. Law, p. 1576, § 425. See, *contra*, Peek v. Railway Co., 10 H. L. Cas. 473; Kenney v. Railroad Co., 125 N. Y. 422, 26 N. E. Rep. 626; Mynard v. Railroad Co., 71 N. Y. 180; Nicholas v. Railroad Co., 89 N. Y. 370. If the question were a new one in New York, it is possible that a different rule might be established from that which now prevails. See Mynard v. Railroad Co., *supra*; Nicholas v. Railroad Co., *supra*. In the case of free passengers, it has been held that, since the carrier is not bound to transport them, it may impose such terms, short of wilful negligence or injury, as it chooses, as a condition of carrying them. Quimby v. Railroad Co., *supra*; Rogers v. Steamboat Co., *supra*; Griswold v. Railroad Co., *supra*. But, in the absence of any special contract or stipulation,

the carrier is bound to exercise the same degree of care toward a free passenger as toward a passenger for hire. Quimby v. Railroad Co., *supra*; Rogers v. Steamboat Co., *supra*. So, if a passenger insists upon riding, or is required by the nature of his occupation to ride, in a place not provided for passengers, it has been held that the carrier properly may say to him that he must take the risk however arising. Hosmer v. Railroad Co., 156 Mass. 506, 31 N. E. Rep. 652; Robertson v. Railroad Co., 156 Mass. 525, 31 N. E. Rep. 650; Bates v. Railroad Co., 147 Mass. 255, 17 N. E. Rep. 633. And, in the case of merchandise, it has been held that the carrier may properly limit its liability in various ways, so long as it does not claim exemption from its own negligence, or that of its servants. School Dist. in Medfield v. Boston H. E. R. Co., *supra*; Squire v. Railroad Co., *supra*; Hoadley v. Transportation Co., *supra*; Grace v. Adams, *supra*. None of these cases support the defendant's contention that in the case of a passenger for hire, who is being transported as such passengers usually are, the railroad company may contract to be relieved from liability for injuries caused by its negligence, or that of its servants. The plaintiff's intestate was, as we have already seen, such a passenger, although in the defendant's employ; and the contract on the back of the ticket was therefore invalid, so far as it purported to exonerate the defendant from liability for its negligence, or that of its servants. Exceptions overruled.

EXPERT TESTIMONY.

The practice of admitting the testimony of experts is of very ancient origin. The Roman law provided that persons "*artis periti*" might be summoned by the judge in order that he might inform himself as to matters embraced by the various trades and professions in their several specialties.[1] Likewise many of the nations of Continental Europe at an early date introduced into their laws provisions for admitting the testimony of the expert. It was a requirement of the Criminal Code of Charles V., which was drawn up at Ratisbon in 1532, that medical expert testimony should be taken wherever death was supposed to have occurred through violence. Francis I., after the publication of the Carolina Code, decreed that both physicians and surgeons should be legally required to act in a medico-legal capacity. Henry IV. (1606), provided that his chief physician should be empowered to appoint two surgeons in every city or important town, whose duty it should be to examine and report upon all wounded or murdered men, and Louis XIV. decreed that physicians must always be present with surgeons at the examination of dead bodies.[2] About the first book written upon the subject was a treatise by a German doctor, Johannes Bohn, published about 1698, and in 1704 the same author produced a more voluminous work, a book of rules for the guidance of medical experts in courts of law. A very early English record shows, in a case of mayhem, a demand that the court examine the wound to decide as to whether there had been a maiming or not, and, as the court was unable to reach a decision, a writ was issued to the sheriff to cause "*medicos, chirurgicus de melioribus ad informandum dominum regum et curiam venire.*" The year books also show several cases into which expert testimony was, of necessity, introduced.[3] Expert testimony may then be well said to have grown up with the common law, or, at least, to have become a recognized part of it at a very early date. As to the wisdom of admitting the testimony of the expert there is a wide divergence of opinion. The mind looks with a natural suspicion upon the witness whose testimony is bought and paid for; added to this, but more particularly within the domain of medicine there has been presented of late, all too frequently, the spectacle of two experts upon the witness stand, both of equally exalted reputation, at a total variance of opinion as to the subject upon which they were called upon to testify. Mr. Wharton,[4] quoting from the *New York Evening Post*, presents the following excellent example of this lamentable condition of affairs: "A striking instance of an unexpected source of error in scientific investigation was witnessed in the last case tried by Mr. Justice Jones, the Superior Court in this city (New York), being the case in which the house of J. & J. Coleman established their right to a bull's head as their trade-mark on mustard. Professor X, one of the most celebrated analytical chemists of New York, a witness called by the defendant, had alleged, as the result of his experiments, that mustard contained over eleven per cent. of starch. Two other analytical chemists, one of them, Professor Chandler of Columbia College, alleged that mustard contained no starch. The evidence was in this conflicting condition when both parties rested and the case was adjourned until the next morning for argument. In the meantime Professor X applied to the counsel of the defendant to move to so far open the case as to allow him to vindicate by actual experiment in open court, the correctness of his statement as to the existence of starch in mustard. The motion was made and granted, and on the fifth of December last, the court room presented the appearance of a chemical laboratory. The professor, with his assistants prepared mustard for experiment in open court by pounding the seed in a mortar. He placed the crushed seed in distilled water and boiled the mixture over a spirit-lamp. He then threw some of the solution on sheets of filtering paper, and applied his test and exhibited the characteristic blue iodine of starch. The experiment was varied in many ways with the same result, and at the end of the testimony many sheets of paper were thus colored. The demonstration seemed perfect. On Professor Chandler being called to the stand, he

[1] L. 8, Par. 1. X. 1. L. 3, Cod. fin. Reg. III. 39, Edeman, 243.

[2] Fodere's Trite de Med. Leg. vol. 1.

[3] 9 Hen. VII. 16; 7 Hen. VI. 11.

[4] 1 Wharton, Ev. par. 454, note 2.

made experiments, which in his view demonstrated that starch did not exist in mustard, and stated that he was not satisfied with the experiments that had been made by the defendant's witness. "Why," said the defendant's counsel, "are not you satisfied with the reaction for starch exhibited by Dr. X, on a dozen or more sheets of filtering paper?" "I am not certain to begin with," said Professor Chandler, "that the paper would not have produced that reaction without the mustard." Whereupon the counsel handed to the witness some of the clean paper, and asked him to apply the test himself. He did so, and the result was a deep blue, thus showing the illusory nature of the prior tests, and that the experiment was entirely worthless as a proof that starch was contained in mustard. In the Guiteau trial occurs another example of the inaccuracy of this kind of testimony. On page 1648 of the trial report, we find the following: "Q. (By Mr. Scoville for the defense.) "But insanity does necessarily mean disease of the brain?" Ans. (By Dr. Gray a medical expert.) "Insanity necessarily means that there is a conjunction or combination of disease of the brain with mental disturbance." On page 1673 of the same report we find: Q. (By Mr. Scoville.) "The disease itself, I understand you to say, is never inherited?" Ans. (By Dr. Gray.) "Never, insanity is never inherited as a disease." And on pp. 1676, 1677, we find Mr. Scoville introducing five statistical reports of cases of the hereditary transmission of mental diseases drawn up by Dr. Gray as medical superintendent of the New York Lunatic Asylum, for the years 1879, '80, '84, '85, '86. We find the rule laid down that if a man be "*compos mentis*" he can make any will, however complicated; if not, he can make no will, however simple; and the main question seems to be: What state of mind constitutes "*compos mentis*." Then, in Stewart v. Lispenard,[5] we find it decided that the capacity to make the particular will in question is the true test, and although this case is of earlier date than that in 25 N. Y. 9, we find in the case of Van Guysling v. Van Kuren,[6] that the court completely ignored Delafield v. Parish to follow it. Since the case of Stewart v. Lispenard there have been various minor court decisions in New York, many of them at a total variance of opinion as to what was held in Delafield v. Parish. Surely this is as wide a divergence of opinion as ever existed between two medical experts. It is clear that we cannot do without the testimony of the expert. In 7 Rep. p. 19, we find it laid down that, "*Omnes prudentes illa admitere solent quæ probantur iis qui in arte sua bene versati sunt.*" The whole question hinges not upon the admission of the testimony of the expert but upon his capacity and capability. We cannot expect our judges and juries to be storehouses of scientific knowledge. Abolish expert testimony completely, and the cases involving questions of a scientific or artistic nature, if ever rescued from the chaos into which they must of necessity sink, will all too frequently be decided in a manner which the testimony of the expert witness, if admitted, would have rendered impossible. That the sciences, and more particularly that of medicine, are by no means thoroughly developed, will account for much of the contradictory testimony of experts. Then, if we carry in mind the fact that such testimony is, after all, only "opinion" the testimony of experts may be received in suitable cases and will prove of no little value to both court and jury. I dismiss, as utterly untenable, the opinion that expert testimony is given as paid for, or, in other words, may be purchased. I do not believe that an expert can be found who will prostitute the science to which he has devoted himself, the reputation he may possess among men of his own genius, for the sum of money, necessarily small, which he may receive as remuneration for his services in a court of law. I believe the blame for many of the apparent contradictions in the testimony of experts may be fastened upon the members of the legal profession with whom they are brought in contact during the progress of the trial. The incompetency of examining counsel all too frequently detracts from, rather than enhances, the value of an expert's testimony. I quote, as an example, a question recently put to an electrical expert in an action in one of the lower courts of New York: "What would be the effect upon a man if he touched a wire through which a current of electricity sufficient to drive a heavy car up a steep hill, was flowing?" The exact point to be ascertained was, would such a current be sufficiently powerful to cause a man, mounted upon a telegraph pole, to lose his balance? But fearful, no doubt, lest the question, in such form as would render it intelligible to the witness, should prove a boomerang, the examiner carefully veiled it and it might as well have been omitted. This one, of many instances, will illustrate the fact that if much of the testimony of an expert be ambiguous and apparently contradictory, he is not always the sole person to be blamed. If the expert be examined by one of his own profession, who, at the same time is a member of the legal profession, as was the case in the recent trial of Dr. Buchanan, for murder, in New York city, a decidedly better result will be obtained, though such a scheme is unfortunately not feasible in many instances. I am, however, of the opinion that the one side may, in cases where some doubt exists as to the scientific phenomena involved, obtain, by skillful questioning, as much value from the testimony of an expert as the other. It is not then a question as to whether we shall admit expert testimony, but what is the value of expert testimony in each particular instance. This, of course, varies largely in different cases. It is of first importance that the facts upon which an expert's opinion is based be satisfactorily established. It is next necessary that the in-

[5] 26 Wend. 255.
[6] 35 N. Y. 70.

tegrity and skill of the witness be known. Then, where the expert states precise facts in science, as ascertained and settled, or states the necessary and invariable conclusion which results from the facts before him, his opinion is entitled to great weight. Where he gives only the probable inference from the facts stated, his opinion is of less importance. Where the opinion is speculative, theoretical, and states only the belief of the witness, while some other opinion is equally consistent with the facts in the case, it is entitled to but little weight.[7] It is a fact, much to be regretted, that so many of the opinions rendered recently by experts in courts of law should have been of this latter nature.

Who is an Expert.—Here, again, we face a multiplicity of definition and a decided variance of opinion. Many of the definitions that have been attempted are of such a meager nature as to be practically worthless. I have in mind one rendered by a western court in these few words, "An expert is a skillful person," the worthlessness of which is self-evident. In the consideration of the question it is obviously impossible to frame a definition that will be at once concise and clear, and at the same time applicable to every situation that may arise. The rule for the admission of experts as witnesses places the question of qualification, to a great extent, at the discretion of the presiding judge.[8] He may, even if he regard it as necessary, make a preliminary examination of the witness seeking to qualify as an expert. This rule, which at first sight would seem to demand an almost universal knowledge on the part of the court, is fortified by the fact that the witness is subjected, while on the stand, to an examination by counsel that will generally establish or negative his qualifications as an expert. The question as to who is an expert can perhaps be best answered by quoting freely from the case of Jones v. Tucker.[9] Mr. Justice Doe in that case says: "When the witness is offered as an expert, three questions necessarily arise: 1. Is the subject concerning which he is to testify, one upon which the opinion of an expert can be received? 2. What are the qualifications necessary to entitle a witness to testify as an expert? 3. Has the witness these qualifications? Experts may still give their opinions upon questions of science, skill or trade, or others of the like kind, or when the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, or when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of the knowledge of it; and the opinions of experts are not admissible, when the inquiry is into a subject-matter, the nature of which is not such as to require any peculiar habits or study, in order to qualify a man to understand it.[10] Upon subjects of general knowedge which are understood by men in general, and which a jury are presumed to be familiar with, witnesses must testify as to facts alone, and the testimony of witnesses as experts merely is not admissible."[11] Experts have been described as "men of science,"[12] "persons professionally acquainted with science or practice,"[13] "conversant with the subject-matter,"[14] "persons of skill,"[15] "possessed of some particular science or skill respecting the matter in question."[16] An expert must have made the subject on which he gives his opinion a matter of particular study, practice or observation and he must have particular and special knowledge upon the subject. The rules determining the subjects upon which experts may testify and the rules prescribing the qualifications of experts, are matters of law; but whether a witness, offered as an expert, has those qualifications, is a question of fact to be decided by the court at the trial. The various disqualifications which render a person incompetent to be sworn and to give testimony, are fixed by law, but whether the disabilities exist in a particular case is a question of fact. And whether a disability is such that a person cannot testify at all or only such that he cannot testify as an expert, the existence of the disability is equally a matter of fact, most conveniently and satisfactorily determined at the trial. That an expert must have special and peculiar knowledge or skill is as definite a rule as that the search for a subscribing witness must be diligent and thorough; and whether a witness has special and peculiar knowledge, is as much a question of fact as the question whether the search for the witness has been diligent and thorough. Many are the definitions and explanations which have been attempted. Bell, in his work on Expert Testimony, says: "The legal signification of 'expert' (*ex pertus*) corresponds strictly with the ordinary acceptation of the term, namely, 'one who has skill, experience or peculiar knowledge on certain subjects of inquiry in science, art, trade and the like.'"[17] In Best on Evidence (p. 499, Chamberlain's Ed.), this definition is to be found, "on questions of science, skill, trade and the like, persons conversant with the subject-matter—called by foreign jurists 'experts,' an expression now naturalized among us—are permitted to give their opinions in evidence. This rests on the maxim '*cuilibet in sua arte perito est credendum.*' Coke on Littleton, 125*a*." The application of these rules is of continual occurrence. Medical

[7] Gay v. Union Mutual Life Ins. Co., 9 Blatch. 143.
[8] Howard v. City of Providence, 6 R. I. 516.
[9] 41 N. H. 546.

[10] 1 Greenleaf, Ev. Sec. 440; 1 Smith's Leading Cases, 286; Rochester v. Chester, 3 N. H. 349; Peterborough v. Jaffray, 6 N. H. 462; Marshall v. Ins. Co., 27 N. H. 157; Beard v. Kirk, 11 N. H. 397.
[11] Concord R. R. Co. v. Greely, 23 N. H. 237-243.
[12] Folkes v. Chadd, 3 Doug. 157.
[13] Strickland on Evidence, 408.
[14] Best's Prin. of Ev. Sec. 346.
[15] Rochester v. Chester, 3 N. H. 349 365.
[16] Beard v. Kirk, 11 N. H. 397.
[17] Bell on Expert Testimony, p. 11.

men are frequently called upon to explain the cause of death, or the condition of a person's mind; scientific men, to explain natural phenomena; lawyers to explain laws and customs within the province of their profession. It is not necessary that the person offered as an expert should have combined study with practice, or *vice versa*, in order to be qualified to give testimony as an expert.[18] But observation without either study or practice will never be sufficient.[19] Nor is it at all necessary that he should at present be engaged in the practice of the art, trade or profession as to which he is called to testify. When the testimony of an expert becomes necessary, the only requirements are that the witness offered as such should be particularly skilled in the science, art, trade or profession involved in the subject upon which he is called to testify. This skill or knowledge may be acquired in any manner whatsoever provided the witness possess the requisite degree of skill, information or knowledge to entitle his opinion to the credence accorded to that of an expert.[20] The rule is, or ought to be, perfectly clear. In the first place, the subject should be one requiring the services of an expert. Secondly, the expert should be qualified and particularly informed, either by practice or special study, as to the subject upon which he is to testify—it is no more the province of the practicing physician, with an experience of one case, to state as an expert opinion that the result of a chemical test, to which certain portions of a dead body have been subjected, evidences the presence of a minute quantity of morphia rather than the existence of ptomaines and leukomaines, than it is within the sphere of a chemist to prove that a person is afflicted with nystagmus. And lastly, when rendering his testimony, it is never the privilege of an expert to assume the functions of a jury; a method has grown up, which well-nigh evades this rule—the hypothetical question—which will later be referred to at more length.

When is Expert Testimony Admissible? The rule as to this may be stated as follows: When the controversy, from its nature, necessarily involves questions of a scientific nature which, without the opinions of witnesses, skilled in the science, profession, trade or art in question, can not be presented to a jury in such form as to enable them to decide the question involved with the requisite degree of knowledge or judgment, the testimony of experts may be introduced.[21] The admissibility of the testimony of the expert may be said to be provided for in almost every civilized country, though the method of receiving it may vary somewhat. In Scotland the report of the medical man engaged in a case forms a part of the preliminary investigation, or precognition as it is called, before the Procurator Fiscal. In England, as in the United States, the testimony is all received at the trial. On the Continent, and more especially in France and Germany, experts, when medical men, are chosen from a special class and act singly or in conjunction with each other. In these cases instead of being subjected to a *viva voce* examination at the precognition or the trial, the expert is presented at the preliminary investigation, with a series of written questions together with the written depositions of the witnesses and of the accused, and from the study of these he is required to render in writing his opinion in the case, adding at length the reason upon which such opinion is based. This system, as I have before stated, applied more particularly to the medical expert and is not without its advantages. Were it possible to secure a staff of recognized experts in each State, it would greatly enhance the value of expert testimony. As it stands to-day, in this country, the testimony of the expert, the "paid witness" is looked upon with pronounced disfavor by the public, while the general sentiment of the legal profession may be gathered from the following excerpt from Mr. Wharton's work on Evidence (vol. 1, par. 454): "Few specialties are so small as not to be torn by factions; and often, the smaller the specialty, the more inflaming and bitter and distorting are the animosities by which these factions are possessed. Peculiarly is this the case in matters physcological, in which there is no hypothesis so monstrous that an expert cannot be found to swear to it on the stand and defend it with vehemence when off the stand. '*Nihil tam absurde dice potest, quod non dicatur abalioquo philosophorum!*'" To return, however, to this question as to when expert testimony is admissible. There is but little to be added, by way of explanation, to the definition before given. It is a fixed and certain rule that an expert may not give an opinion as to common every day facts that lie within the knowledge of every man.[22] Nor may he give an opinion of law.[23]

Scientific Testimony in the Examination of Written Documents.—This field is one in which the testimony of the expert has proved of particular value. In questions as to a testator's signature, in the discoveries of the authors of anonymous letters, in cases of forgeries, in every case where there has been a dispute as to the authenticity of handwriting, the testimony of the expert has always been of particular service. The rule as to the admission of this kind of testimony is extremely clear and simple. Where the authen-

[18] Taylor v. Railway, 48 N. H. 304; Mason v. Fuller, 45 Vt. 29.

[19] Perkins v. Stickney, 132 Mass. 217; Clark v. Bruce, 12 Hun, 271.

[20] Emerson v. Lowell Gas Light Co., 6 Allen, 146; Caleb v. State, 39 Miss. 721; Fairchild v. Bascom, 35 Vt. 398.

[21] Van Zandt v. Mut. Ben. Life Ins. Co., 55 N. Y. 139; Kennedy v. People, 39 N. Y. 255-257; Shelton v. State, 34 Tex. 663.

[22] 1 Phillips' Evidence, 780; Taylor's Evidence, 1230.

[23] Carrington v. Burden, 15 How. 270; Winans v. N. Y. & E. R. R. Co., 21 How. 88; The Stearine Kaarsen Fabrick Gonds Co. v. Heintzman, 17 C. B. (N. S.) 56.

ticity of handwriting is in question, the testimony of an expert upon the subject is admissible. The following may be stated to be the rules as to the value of testimony with regard to manuscripts, signatures, etc. I. The best evidence as to the writer of the manuscript, is the evidence of one who has seen him write. II. Second in value is the evidence of one who has carried on a correspondence with the person whose writing is in dispute. III. The third in value is that obtained by the comparison of handwritings, the testimony of the caligraphic expert. Let me, before proceeding farther in the discussion of this field of expert evidence, quote somewhat at length, from an anonymous article, that appeared in 2 Criminal Law Magazine, 139. "That a man's handwriting is anything but the product of his will is a proposition familiar enough. Thus, a man may will or wish to write a round copper-plate hand, or an angular foreign hand, without being able to do it. If a man could regulate his penmanship by his will, of course there would be the end of caligraphic experts. The forgery, which now and then is once successful, would travel on indefinitely, deceiving the very elect, instead, as the rule is, of depending for its success—if success it have at all—upon a single slip of the paying teller. But that he cannot, imitate as skillfully as he will, divest himself of his own natural characteristic, has now come to be demonstrated. The accomplished expert has only to study his man. The hand of a writer is beyond the power of that writer's will or that writer's eye. The will is absorbed by the subject-matter. The eye watches the paper, keeps the hand running in lines, prevents the line gliding over the edge, etc. But once in motion the hand will acquire the nervous motion which, as surely as it moves at all, writes down itself, its very self and no other. An effort to make a single letter would be an unusual movement, perhaps, for any but a writing master, but when rapidly advancing from letter to letter and from word to word, lifting itself slightly every instant to skip the place between the words, the hand will measure off from parts of letters to the next succeeding part and from one word to another until it is taken up, a sort of gauge, running like a machine, and, whether regular or uniformly irregular, this gauge will be not the least reliable feature of the characteristic." As to the introduction and reception of the testimony of a caligraphic expert, the rules that govern the testimony of an expert in any of the various branches as to which such testimony is admissible are to be applied. Once let it be settled that the case is of such a nature that the skill of one thoroughly versed in the science of caligraphy must be adduced before the average man can fairly decide as to its merits, then the testimony of an expert in the matter must be admitted. As to the qualifications of an expert the general rule again applies—the integrity, skill and experience of the witness must be thoroughly established, his inference together with a precise statement of the reasoning upon which it is based is then entitled to the full weight usually accorded to the testimony of an expert in any of the other branches of the sciences, trades and arts. But on the question of expert testimony in the matter of handwritings there remains another point to be considered. A man may have become, through the course of events, an expert as to the handwriting of some one particular person. Thus, the genuineness of B's signature may be in question and the opinion of A, who has carried on a long correspondence with the supposed signer, is sought to be introduced. If A can satisfactorily establish the fact that he has received numerous letters which were signed by B and is familiar with B's signature by reason of having seen him write, then A, although not being a witness as to the fact of B's having executed the disputed signature, nor yet claiming for his testimony the weight accorded to that of a general caligraphic expert, becomes, as it were, a special expert as to this precise question and his testimony is undoubtedly admissible.

The Medical Expert.—There is probably no branch of expert testimony so frequently adduced as that represented by the medical expert. In point of time one of the first witnesses that was permitted to give testimony that was mere opinion and not based upon actual facts, his appearance has been growing more and more frequent until to-day scarcely a criminal trial of any importance is conducted without the presence of one or more experts skilled in the various branches of medical science. It is useless to regard this species of testimony with contempt, to impress upon juries that, because of the divergence of opinions evidenced by the experts called, the entire system is worthless, or, at its best, of little value. The practice of admitting medical expert testimony has practically grown up with the common law, and like the latter has varied with the time and customs of the country. As to the admission of the testimony of medical experts, Mr. Wharton[24] says, "so jurisprudence does not say to a surgeon or physician called to testify whether a wound or a poison was fatal, 'you must have a particular diploma or belong to a particular professional school;' but it says, 'If you have become familiar with such laws of your profession as bear upon this issue, then you can testify how the issue is affected by such laws.'"[25] This familiarity may be gained from study rather than from practice,[26] though it is clear that the knowledge is equally valuable if acquired from practice merely or from both practice and particular study. It must depend upon the particular state of facts as to whether the testimony of a physician is admissible.[27] The following are a

[24] 1 Wharton's Ev. Sec. 441.

[25] Livingston's Case, 14 Grat. 592; New Orleans Code v. Allbritton, 38 Miss. 242.

[26] Fordyce v. Moore, 22 S. W. Rep. 235.

[27] Graves v. City of Battle Creek, 54 N. W. Rep. 77; Wabash Ry. Co. v. Friedman, 41 Ill. App. 270.

few of the many instances in which the testimony of the medical expert is admissible—the nature and effects of a disease.[28] The likelihood that a certain disease would produce death.[29] A surgeon may be permitted to prove the nature of a wound and its probable cause and effects.[30] It is to be noted that in no case is a witness permitted to usurp the functions of the jury,[31] although a witness may be asked his opinion upon a similar state of facts, hypothetically stated,[32] an arrangement that in many cases amounts to practically the same thing.

The Hypothetical Question.—It is the usual rule that where an expert witness has no actual knowledge of the facts in the case, that the statement of facts already proved should be summed up in the form of a hypothetical case and the witness asked what would be his professional opinion on the subject-matter of his testimony, if such facts were actually true.[33] But it must be noted that if the facts upon which the hypothesis is based fall, then the answer falls also.[34] Nor can an expert be asked a hypothetical question upon facts not proven in the case.[35] This, however, is not the rule in New York and in several other States. In those States the hypothetical question may be based upon any possible or probable range of the evidence in the case.[36] But, as a rule, it is nowhere necessary that the hypothetical question should be based upon the exact reproduction of the evidence, or an accurate presentation of what has been proved; it will be sufficient if it be in accordance with any reasonable theory of the effect of the evidence.[37] Where there is, however, absolutely no foundation in the case for the facts assumed, the hypothetical question based upon such facts is properly excluded.[38] This hypothetical question, like almost every other element that constitutes a part of expert testimony, has been subjected, at times, to the most severe criticism and, perhaps, with some degree of justice. The wider the latitude permitted in propounding the question the more evil the result. That the admission of this species of question is not accompanied by certain undeniable merits will be readily admitted, but it must be acknowledged that it has certain marked disadvantages. Among the many minor questions involved in the discussion of the testimony of experts, and, more particularly, of medical experts, is that of the right to demand compensation for testifying. It is clearly inequitable to class such men with the ordinary witness, the skill and labor which an expert is expected to employ involves an expenditure, of time, labor and preparation not expected of the witness who testifies to facts alone. There can be no doubt that, if the case be one of public nature, a witness might be compelled to give an opinion as an expert without compensation. But as to the ordinary class of cases the rule as laid down by Greenleaf on Evidence (Sec. 310, n.) prevails. That author says, and his statement is supported by the weight of authority, "there is a distinction between a witness to facts, and a witness selected by a party to give his opinion on the subject with which he is peculiarly conversant, from his employment in life. The former is bound as a matter of public duty to testify as to facts within his knowledge, the latter is under no such obligation; and the party who selects him must pay him for his time before he will be compelled to testify."[39] This rule also prevails in England.[40] But the rule is by no means universal in the United States. In some States, as for example Rhode Island[41] and Iowa[42] the compensation of experts is provided for by statute, while in Indiana,[43] an expert may be compelled to testify without extra compensation. Another question that is of no small importance arises as to the admission of scientific treatises and writings as evidence. It will be at once clear that books upon scientific subjects that yearly expand and become developed should not be admitted to prove the facts they set forth.[44] This is otherwise in Iowa by statute,[45] and the contrary practice prevails in several other States.[46] It is true that an expert witness may cite authorities to show that the general consensus of opinion in his profession agrees with his testimony and may even refresh his memory by turning to standard authors in the domain of his specialty.[47] But witnesses may never read extracts from such works as primary proof in their departments.[48] Where a scientific witness has cited authorities to sustain his position it is generally permitted to put such works in evidence to discredit and contradict him.[49] This is permitted in California under the code.[50]

[28] *In re* Vananken, 10 N. J. Eq. 186.

[29] State v. Smith, 32 Me. 329; Mathson v. Ry. Co., 35 N. Y. 487.

[30] Rumsey v. People, 19 N. Y. 41; Com. v. Piper, 120 Mass. 186.

[31] Rex v. Wright, Russ. & R. 456; Sills v. Brown, 9 Car. & Payne, 601.

[32] Sills v. Brown, *supra.*

[33] Reynolds v. Robinson, 64 N. Y. 589; Dexter v. Hall, 15 Wall. 9; Heald v. Thing, 45 Me. 392; Fairchild v. Bascomb, 35 Vt. 398.

[34] Hovey v. Chase, 52 Me. 304.

[35] Muldowney v. Ry. Code, 39 Iowa, 615.

[36] Harnett v. Garvey, 66 N. Y. 641.

[37] Hall v. Rankin, 54 N. W. Rep. 217; Baker v. State, 30 Fla. 41.

[38] People v. Harris, 136 N. Y. 423.

[39] People v. Montgomery, 13 Abb. Pr. (N. S.) 207. LeMere v. McHale, 30 Minn. 410.

[40] Parkinson v. Atkinson, 31 L. J. C. P. (N. S.) 199; Turner v. Turner, 5 Jurist (N. S.), 839.

[41] Stat. 1882, p. 733, Sec. 15.

[42] 40 Iowa, 646.

[43] Rev. Stat. 1894, p. 175, Sec. 512.

[44] Washburn v. Cuddihy, 8 Gray, 430; Com. v. Brown, 121 Mass. 9; Huffman v. Click, 77 N. C. 55.

[45] 35 Iowa, 429.

[46] Bowman v. Wood, 1 Ind. 441; Boyle v. State, 57 Wis. 472; Tucker v. McDonald, 60 Miss. 460.

[47] Pierson v. Hoag, 47 Barb. 243; Harvey v. State, 40 Ind. 516.

[48] Washburn v. Cuddihy, 8 Gray, 430; Comm. v. Sturtevant, 117 Mass. 122.

[49] Punny v. Cahill, 48 Mich. 584.

[50] Galagher v. R. R. Co., 67 Cal. 13.

The Legal Expert.—The court of the place of trial will not, of itself, take cognizance of foreign laws. These must be offered and proved in evidence, and, though this may, as a rule, be accomplished by offering statutes under the seal of the foreign sovereign, or, as is customary in the United States, by presenting the statute laws of such foreign State in such a form as they are officially issued by that [State[51] (the matter in these last two States, being provided for by statutes), nevertheless, it is the more general custom to prove foreign laws, whenever possible, by the testimony of experts.[52] But a certificate of a foreign expert will never suffice. The witness himself must be examined under oath.[53] In all other relations of their profession the testimony of lawyers, not necessarily experts, is admissible, for example as to the practice of the courts.[54] But in order to render a witness competent to testify as to foreign law he must be either a professional man, or, at least hold some official situation which presupposes the knowledge of the laws of the country, as to which he is called upon to give an expert's testimony.[55] This rule has been broadened in the United States, to include such persons, whom, as from the nature of their business, are likely to be acquainted with the laws of the foreign country in question.[56] But the rule does not extend so as to include such persons as have derived their knowledge of the law in question from a mere course of study.[57] A very broad rule prevails in New Hampshire and one not without a great deal of merit. In that State the court has laid it down as a rule that any person who appears to the court to be well informed as to foreign laws may give expert evidence thereon whether he be a professional lawyer or not.[58] It is however, better to increase the qualifications necessary to admit a witness as an expert in the many broad fields of the law of foreign States and countries, rather than to decrease them. Since the court is presumed to be unacquainted with the subject in discussion it might prove rather a difficult task to discover whether the witness offered as an expert upon such an important topic was possessed of any higher legal attainments than an ability to convince the court that he was well informed. Where it becomes necessary to admit such testimony, it will be readily seen that its accuracy is all important, it were better then, by increasing the necessary qualifications, to reduce the number of those fitted to present it and so insure a greater accuracy.

Experts in the Mechanical Sciences, Trades, etc.—It is never necessary, to constitute a man an expert, that he should necessarily follow the trade, art, or profession relative to which his testimony is adduced, his competency or incompetency hinges alone upon the extent of his knowledge of such particular topic. So any person, familiar with a trade may testify as to the meaning of particular words or phrases used in such trade.[59] There are no rules particular to these minor branches of expert testimony. The main question being, in such cases, "Is this case one in which expert testimony may properly be introduced?" or, that being answered, "is the witness an expert within the meaning of the term?" It then is only necessary to examine several of the more important heads under which these questions or either of them, have been raised.

Architects.—After a witness has testified to facts showing that he has some knowledge of the cost or value of buildings, acquired as a dealer, builder or architect, his testimony as to the value of a building is competent.[60] But it is never allowable to admit the testimony of an expert no matter how well qualified to prove the existence of a custom or usage merely,[61] since a custom to be recognized in the law, must be sufficiently well known as to require no such proof.

Mechanics.—A machinist is always competent to give an opinion as an expert in relation to the construction of machinery.[62] And he may even given evidence that a machine was not constructed in a workman-like manner without specifying the particulars in which the machine was defective.[63]

Insurance Experts.—If we leave out of consideration the professions, there are few branches of the subject of expert testimony that are of more importance than that represented by the insurance expert. Probably one of the most familiar, as well as one of the most important cases under this head is that of the Milwaukee & St. Paul Ry. Co. v. Kellog.[64] In this case an exception was taken because of the refusal of the lower court to permit the defendant to show by witnesses who were experts in the business of fire insurance, that, owing to the distance between a mill and a pile of lumber, the mill would not, in case of fire insurance, be considered in measuring the hazard of the lumber, or *vice versa*. Mr. Justice Strong, delivering his opinion of the court, said: "This exception is quite unsustainable. The subject of the proposed inquiry was a matter of common observation, upon which the lay or uneducated mind is capable of forming a judgment. In regard to such matters experts are not permitted to

[51] Pease v. Peck, 18 How. (U. S.) 595; Mullen v. Morris, 2 Pa. St. 85; Stewart v. Swanzy, 23 Miss. 502; Pac. Gas Co. v. Wheelock, 85 N. Y. 278; Wilt v. Cutler, 38 Mich. 189.

[52] Church v. Hubbart, 2 Cranch. 187; Ennis v. Smith, 14 How. (U. S.) 400; Ely v. James, 123 Mass. 36; Pierce v. Insedth, 106 U. S. 546; People v. Lambert, 5 Mich. 349.

[53] Ennis v. Smith, 14 How. (U. S.) 400.

[54] Mowry v. Chase, 100 Mass. 79.

[55] Sussex Peer, 11 Cl. & Fin. 134.

[56] Am. Life Ins. Co. v. Rosenagle, 77 Pa. St. 507.

[57] Bristow v. Sequeville, 9 Exch. 275.

[58] Hall v. Costello, 48 N. H. 176.

[59] Evans v. Comm. Ins. Co., 6 R. I. 47.

[60] Woodruff v. Imp. Fire Ins. Co., 80 Ill. 493.

[61] Wilson v. Bauman, 83 N. Y. 133.

[62] Sheldon v. Booth, 50 Iowa, 209.

[63] Curtis v. Gano, 26 N. Y. 426.

[64] 94 U. S. 469.

speak their conclusions. In questions of science their opinions are received, for n such questions scientific men have superior knowledge, and generally think alike." But, in an action upon a policy of fire insurance providing against any increase of risk, the testimony of experts is competent upon the question as to the materiality of circumstances effecting the risk, especially where its determination calls for a degree of knowledge not likely to be possessed by an ordinary jury.[65] In order, however, to make the testimony of an expert competent, it must be based upon facts and not upon mere conjecture. He is not, however, necessarily confined to his own observations but may give testimony upon a hypothetical statement of facts presented to him while upon the witness stand.[66]

Railroad Experts.—Another class of cases in which the testimony of the expert is frequently a necessity, is that arising from railroad accidents, and in such cases, where the question involved is one requiring some peculiar knowledge of mechanics beyond that acquired by the average layman, the expert skilled in such lines is alone qualified to speak.[67] Thus it is competent to show by an experienced engineer the rate of speed that is usually considered safe when an engine is running backward.[68] And a person who has acted continuously for more than seven years as a railroad conductor has been permitted to give expert evidence as to the means of stopping railroad trains.[69]

Patent Experts.—Here, too, we find displayed the animosity that all too frequently marks the admission of the testimony of the expert.[70] In *In re* Taggart, it is said: "Good experts are especially valuable for the skill with which they assist their client and badger, befog, and bewilder the enemy. No wise judge would dare to put his trust implicitly in such witnesses; and, very frequently, the care which is necessary to unravel their sophistries, and avoid the influence of their obvious bias, would be much more profitably employed in an examination of the case without their aid." The rule as to "who is an expert" is, in this class of cases, very clearly defined. The patent act contemplates two classes of persons as peculiarly appropriate witnesses: 1. The practical mechanic to determine the sufficiency of the specifications as to the mode of constructing, compounding and using the patent. 2. Scientific and theoretic mechanics to determine whether the patented article is substantially new in its structure and mode of operation, or simply a mere change of equivalents, and this class Mr. Justice Story considers "the most important and most useful to guide the judgment, and to enable the jury to draw a safe conclusion, whether the modes of operation were new or old, were identical or the reverse."[71] It must, however, be noted, and this fact is common to all classes of cases where it is sought to introduce the testimony of an expert, that the court cannot be compelled to receive an expert's testimony.[72] As to the weight an expert's testimony is entitled to, the rule here is the same as in every other class of this kind of evidence. The knowledge of the witness, his fairness, the ability he evinces, his peculiar advantages for observation, study and research must all be weighed and considered, and upon them the value of his testimony in a court of law must rest.[73] But the necessity for the admission of the testimony of an expert is one to be decided by the court n each particular instance.[74] No rule can be authoritatively laid down to cover every case. The questions concerning expert testimony are of growing importance, little by little the necessity for its introduction has increased, step by step it has grown and developed, until to-day, when scarcely a murder trial of note comes before our tribunals without bringing in its train a small army of experts, representing the one side or the other, it has become impossible to listen, for the weeks that this kind of testimony frequently consumes and to pass it all by as "of little value," or "entitled to put little weight." It is much to be regretted that this kind of testimony should prove, in many cases, so entirely contradictory, and yet the matter is not irremediable. In his monograph upon experts and expert testimony, Mr. Moak says: "As to a remedy in a case where expert testimony is admissible, I can see none, except for counsel, and for the court to inform themselves as fully as possible upon the subject so as to be able to detect and to expose a false or a fallacious statement or conclusion;" and this is indeed the best, and the only remedy. Such preparation would sift down the number of supposed experts who, fearful of an exposure in open court, would hesitate to take the stand; whereas the true expert, confident in his own knowledge and skill, would take the severe test of the witness stand as a mere increase of his own reputation, and thereby doubly enhance his value as an expert witness.

Newark, N. J. GORDON C. HAMILTON.

65 Corning v. Farm Bldgs. Ins. Co., 74 N. Y. 295.
66 Higbie v. Guardian, etc. Life Ins. Co., 53 N. Y. 603.
67 Penn. Co. v. Conlan, 101 Ill. 93.
68 Cooper v. Central Ry. of Iowa, 44 Iowa, 135.
69 Montgomery R. R. Co. v. Blakely, 59 Ala. 471.
70 Patent Commissioner's Decisions, 1869, p. 103.
71 Allen v. Blunt, 3 Story, 742.
72 Winans v. N. Y. & Erie Co., 21 How. 88.
73 Johnson v. Root, 1 Fischer, 351; Morris v. Barret, 1 Fischer, 461.
74 Howard v. City of Providence, 6 R. I. 516.

DEED — BUILDING RESTRICTION — ENFORCEMENT.

CORNISH v. WIESSMAN.

Court of Chancery of New Jersey, August, 27, 1896.

1. The use of a portion only of a building for a meat and vegetable store is a violation of the provision of

the deed of the lot that the premises are to be used for "dwelling purposes only."

2. The provision in a deed of part of a tract in a residence portion of a city that the premises are to be used for dwelling purposes only will be enforced against one purchasing from the grantee with notice thereof, unless it is made clear beyond the possibility of a doubt that the remainder of the tract will not be damaged by its violation.

EMERY, V. C.: The object of this bill is to enforce certain restrictions in relation to the use of land which was conveyed by complainant, Mrs. Cornish, to defendant's grantor, one James R. Schmidt. The deed from complainant to Schmidt conveyed a lot of land in Bloomfield, Essex county, 50 feet front, on Broad street, by 150 feet deep, the conveyance containing the following clause at the end of the description: "The above premises to be used for dwelling house purposes only, with the necessary barn and outbuildings." This deed was dated September 20, 1895, and recorded September 25, 1895. On October 3, 1895, James R. Schmidt and wife, for an expressed consideration of one dollar, and, by deed of bargain and sale, conveyed the premises in question to the defendant Wiessman. In this deed the restrictive clause was omitted. Wiessman has put up a building on the premises, and the front part of the first floor of the building (being all of the front except a hallway) he uses for the purpose of a meat and vegetable market. The upper part of the building and the rear of the first story are used for the purposes of a dwelling by the defendant. A porch, with a wooden awning or roof, and supported by small pillars near the curb line, extends across the whole width of the building over the first story, and across the sidewalk. This porch is sometimes used for displaying or storing the meats. On receiving information of defendant's intention to use part of the building for this purpose, and before its erection, complainant filed her bill to restrain the use of the premises in violation of the restriction, and, upon filing the bill, applied for a preliminary injunction, but this was denied, and the rights of the parties reserved to be determined on final hearing. Pending the hearing, defendant, at his risk, proceeded with the erection of the building according to his plans, and is now carrying on a meat and vegetable market on the first floor of the building, and claims the right to do so notwithstanding the restriction in the deed to Schmidt, his grantor. It is not claimed that he is not chargeable with notice of the restriction in Schmidt's deed, for it is conceded that under the doctrine settled in Brewer v. Marshall, 19 N. J. Eq. 537, and Hayes v. Railroad Co. (1893, McGill, Ch.), 51 N. J. Eq. 345, 349, 27 Atl. Rep. 648, the defendant is chargeable with constructive notice of the restriction in the Schmidt deed, which was one of his muniments of title. Upon the question of notice, moreover, I am satisfied from the evidence in this case that the defendant, before taking his deed from Schmidt, had actual notice of this restriction in Schmidt's own deed.

The general rule in this State in relation to the enforcement of restrictions of this character is thus stated by Chancellor McGill in Hayes v. Railroad Co., 51 N. J. Eq. 348, 27 Atl. Rep. 649: "It is settled by adjudication in this State, as a general rule, that where a grantor, retaining a portion of the land out of which the grant is made, enters into an express written understanding with his grantee, whatever may be its form, whether covenant, condition, reservation, or exception, which restricts the enjoyment of the portion of the land which is conveyed, in order to benefit the portion retained, and the restriction is reasonable and consonant with public policy, whether it runs with the land, and is binding at law, or not, it will be enforced in equity against the grantee and any one subsequently acquiring title to the land with notice of it, at the instance of the grantor or subsequent owner or owners of parts of the remaining land, when its violation results in material detriment to the portion of the remaining land, which the complainant in the suit holds." The lot sold to Schmidt was part of a tract containing over three acres, owned by the complainant. Complainant's residence was near the center of the tract, and the whole tract is situated in the residential part of the town of Bloomfield, and is well adapted for residence purposes. There were but few places of business of any kind in the neighborhood, and the restriction was one which, in view of the situation of the remaining tract, it was within the right of the complainant to impose as a reasonable restriction, so that the sole question now is whether she is entitled to have it specifically enforced against the defendant, who purchased with notice.

The defendant' counsel oppose the relief prayed for on two grounds: First, and mainly, because, as he asserts, the building is in fact defendant's dwelling house, and the use of a portion of it as a meat and vegetable store does not violate the covenant. Counsel insist that the house still continues to be a dwelling house, although a portion may be used for a store or market, and treats the case as if the question under the covenant was whether this building may still be considered as legally a dwelling house, although some portion of it is used for a store or market. Even if the question arose in this shape, I should be inclined to say that, considering the object of the restriction, the building, part of which is occupied as a store, could not be called a dwelling house only. One plain object of such a covenant is to distinguish between the use for dwelling house or residence and the use for purposes of trade. But the covenant in this case reaches directly to the use of the building or any part of it. It is that the premises are to be used for "dwelling house purposes only." As it seems to me, it is impossible to say that a "store" or "market" use or purpose is a dwelling house

purpose. The whole of the premises (which will include the whole of any building on the premises) must, under the form of this covenant, be used only for dwelling house purposes or barn and outbuildings; and, I think, the use of any portion of the building, for the purposes of the trade defendant carries on, is a clear violation of the covenant.

In the first place, it is urged that complainant has not shown any damage, or, at least, any material damage, from the violation of the covenant, and the court of equity, therefore, will not interfere; and I am asked to determine the question of her injury, as matter of fact, upon all the evidence, and especially to decide whether the complainant, with the defendant's meat store where it is, is not better off than before he opened it, and when he carried on his business on the opposite side of the street. The complainant proves by some witnesses that, in their opinion, her remaining property will be damaged for residential purposes by the continuance of defendant's market, and I think their judgment is well founded. The case is certainly one in which the fact that there is no damage is not so clear that it can be said to be free from all possibility of doubt. The rule to be applied, therefore, is the one stated in Kerr, Inj. 532, and applied by Chancellor Zabriskie in Kirkpatrick v. Peshine (1873), 24 N. J. Eq. 206, where a bay window projected over the building line, and it was urged that no damage was done: "There may be cases in which the damage to arise from the breach of the covenant would be inappreciable, and in which the court would refuse to interfere. But the case must be free from all possibility of doubt. It must be clear that there is no appreciable, or, at all events, no substantial, damage, before the court will, upon the ground of smallness of damage, withhold its hand from enforcing the execution. The mere fact that a breach of the covenant is intended is a sufficient ground for the interference of the court by injunction. A covenantee has the right to have the actual enjoyment of the property, *modo et forma*, as stipulated for by him. It is no answer to say that the act complained of will inflict no injury on him, or will be even beneficial to him. It is for the plaintiff to judge whether the agreement shall be kept, as far as he is concerned, or whether he shall permit it to be violated. It is not necessary that he should show that any damage has been done. It being established that the acts of the defendant are a violation of the contract, the court will protect the complainant in the enjoyment of the right he has purchased." The right to enforce building restrictions and restrictions upon the use of property is now so clearly settled and so generally recognized, especially as to urban and suburban property, that the whole system of such restrictions would be put in jeopardy if the right to enforce them depended upon the decision of the court in each case as to the amount of damage or injury. A purchaser deliberately and intentionally disregarding the restriction should make it clear "beyond possibility of doubt" that the complainant cannot be damaged. This has not been done here, and the defendant, having proceeded at his peril with the erection, after notice of complainant's rights and her intention to enforce them, must bear the penalty. An injunction will be advised restraining the use of the premises or any part of the building thereon for the purpose of his market, and from the use of the building except for dwelling house purposes only. Complainant is entitled to costs.

NOTE.—*Restrictions in Deeds.*—A deed like any other contract may contain stipulations and restrictions of various kinds, and courts in construing them will endeavor to ascertain the intention of the parties and will give effect to such intention when ascertained. 2 Devlin on Deeds, § 990. Restrictions inserted in a deed as part of a scheme for a plan of improvement are not to be deemed conditions in the technical sense, although spoken of as conditions. A forfeiture does not arise from their breach. Ayling v. Kramer, 133 Mass. 12. If a deed contains a restriction that no building shall be placed upon the land within a specified distance of a street, the street as it existed at the time of the imposition of the restriction, and not as subsequently altered by public authority, is the one to which reference is considered to be made. Tobey v. Moore, 130 Mass. 448. If a deed contains the restriction that the front wall of any building erected on the lot should be set back a distance of twenty-two feet from the street, with the proviso that "steps, windows, porticos and other usual projections appurtenant thereto, are to be allowed in said reserved space of twenty-two feet," the restriction is violated by the projection of the whole front wall except less than two feet at each end, into the reserved space, into the form of a bay extending up the whole height of the house, with a foundation roof and windows. This is true, notwithstanding such projections had been usual in the city for several years, and that the grantor subsequently conveyed lots in the same locality permitting such projections. Linzee v. Mixer, 101 Mass. 512. See Nowell v. Academy, 130 Mass. 209. For a case in which certain erections were held to be a violation of a restriction that the front line of the building should be fifteen feet from the street and "that no dwelling house or other building shall be erected on the rear of said lot," see Sanborn v. Rice, 129 Mass. 387. A restriction forbidding the use of a building for the trade of a butcher or for any "nauseous or offensive trade whatsoever," or for a purpose "which shall tend to disturb the quiet or comfort of the neighborhood," does not prevent the use of the building for the sale of groceries and provisions. Tobey v. Moore, 130 Mass. 448. But where a deed contains a restriction that no building with the exception of a dwelling-house shall be erected on the lot, and that such building when erected shall not be used for the purpose of carrying on any offensive trade or calling, the erection of a building and the occupation of the lower story as a retail grocery constitute a violation of the restriction. The use of the building in this manner may be restrained by injunction. Dorr v. Harrahan, 101 Mass. 531. This case differs from Tobey v. Moore, *supra*, in that the grantee was restricted from erecting anything but a dwelling-house. See also Linzee v. Mixer, 101 Mass. 512. For other cases in which restrictions have been construed, see Higman v. Stewart, 38

Mich. 513; Chapman v. Gordon, 29 Ga. 250; Hicks v. McGarry, 38 Mich. 667; Scott v. Ward, 13 Cal. 458; Beals v. Case, 138 Mass. 138; Thompson's Appeal, 101 Pa. St. 225; Barker v. Barrows, 138 Mass. 578. In Reardon v. Murphy (Mass.), 40 N. E. Rep. 854, it was held that a restriction in a deed "that no building shall be placed at a less distance than twenty feet from said easterly line of P street" is violated by the erection, within the prohibited distance of a piazza, eight feet wide, encircled by a railing, and having a roof supported by posts, attached to a house, and extending along its entire front. In Attorney-General v. Gardiner, 117 Mass. 492, a structure three feet high, erected within a restricted space for coal bins, while considered as no part of the defendant's house, was held to be of itself a building. The same has been held as to a pavillion. Buck v. Adams, 45 N. J. Eq. 852, 17 Atl. Rep. 961. See, also, Blakemore v. Stanley, 139 Mass. 6, 33 N. E. Rep. 689. Bay windows are undoubtedly part of a house, and cannot extend over restricted ground. Sanborn v. Rice, 129 Mass. 387, 395; Payson v. Burnham, 141 Mass. 547, 6 N. E. Rep. 708; Manners v. Johnson, 1 Ch. Div. 673. In Bagnall v. Davies, 140 Mass. 76, 2 N. E. Rep. 786, the restriction was that no building should be erected within twenty feet of a certain street. The front line of the defendant's house was twenty feet from the street. In front of this was a piazza, the front line of which was fourteen feet from the street. The piazza was covered by a continuation of the roof of the building, which extended to within less than fourteen feet of the street. In the roof was a protecting dormer window, by means of which a portion of a room in the second story seven one-quarter feet wide, out of which this window opened, was carried to a point seventeen feet from the street. The posts which supported the projecting portion of the second story were six inches in diameter, and supported by brick piers resting on the ground. It seems that the defendant in the case of Reardon v. Murphy, contended that the court in Bagnall v. Davies did not order the piazza disturbed. But while the opinion does not state in terms that the posts were within the restriction it does say that the "portions of the roof and of the dormer window which extend beyond the front wall toward the street are extensions of the building, and a part of it, within twenty feet of the street, within the meaning of the restriction." As the court says, there can be no ground for a distinction between a piazza covered by an extension of the main roof of a house and one covered by its own roof and attached to the house.

JETSAM AND FLOTSAM.

CONSTRUCTION OF WILL—LIFE ESTATE—POWER OF DISPOSAL.

The question as to whether a devise of an estate generally, coupled with a power of disposal, passes a fee or only a life estate, has once more been the subject of judicial interpretation by the Supreme Court of Connecticut in the case of Mansfield v. Shelton, 35 Atl. Rep. 271. The provisions of the will, which came up for construction in the case, were as follows: "All the rest and residue of my estate, both real and personal and wherever situated, I give, devise and bequeath to my said wife, to be used and appropriated by her, as much as she may wish for her happiness, without any restrictions or limitations whatsoever," followed by a clause that after the death of the wife, and the payment of her debts, and the settlement of her estate, whatever property should remain should pass to a trustee for final distribution as directed. The court decided that only a life estate vested in the widow of the testator, and in arriving at the conclusion discussed in an extended opinion a great many authorities on the subject.

From an examination of these cases several conclusions can be deduced as to the exact *status* of the law:

1. That where a primary gift conveys and vests in the first taker an absolute interest in personal, or an absolute fee-simple in real property, it exhausts the entire estate so that there can be no valid remainder.

2. That where a life estate is expressly created, it will not be converted into a fee, absolute or qualified, or into another form of estate greater than a life estate, merely by reason of there being coupled with it a power of disposition, however general or extensive.

3. Though an express gift in fee will not be reduced to a life estate by mere implication from a subsequent gift over, it may be so reduced by subsequent language clearly indicating intent and equivalent to a positive provision.

4. Under these limitations, and at times apparently infringing upon them, the intention of the testator as ascertained from the instrument, and, where necessary, by careful extrinsic evidence, governs the interpretation of such provisions.

An example of the first of these principles is the case of Methodist Church v. Harris, 62 Conn. 93 (1892). In that case the testator bequeathed his property to his wife "and her heirs forever, and after her death such of it as might remain to the Methodist Church," and in deciding that the widow took the estate absolutely the court said that the testator had made a bold attempt to limit a fee upon a fee which the court would not allow.

The case of Lewis v. Palmer, 46 Conn. 454 (1880), aptly illustrates the second of these principles. In that case a testator gave "to his sister S, the use of all the rest of his real estate during her natural life and for her to dispose of it as she may think proper or just. The language of the court was as follows: "While, as a rule, the gift or devise of property generally, with power to sell, and no subsequent limitation carries an estate in fee, nevertheless, there is no case where a life estate expressly created was enlarged to a fee by a power of sale. There are cases where there is an apparent life estate with power of disposal, without any disposition of the remainder, in which it is held that the devisee takes a fee. There are other cases where there is a devise of an estate generally, with an express power to sell, in which it is held that the devise over of the remainder is void for repugnancy. But we think none of the cases go so far as to disregard the obvious and acknowledged intention of the testator. All regard that, when discovered, as conclusive."

In Glover v. Stillson, 56 Conn. 316 (1889), the devise was "to P and M, for the term of their natural lives, with power to dispose of any portion of the estate, if they might so desire," and after their decease a part of the property was to go to certain relatives and the remainder to an orphan asylum. The court held that to enlarge the life estate into a fee, simply because a power of sale was appended, would be to subvert the intention of the testator to a mere artificial canon of construction. In Peckham v. Lego, 57 Conn. 553 (1890), a will gave to W and his wife the use and

improvement of certain real estate during their natural lives, with the further provisions that it should be necessary for their personal comfort to use any portion of said property, it is my will that they should do so exercising good judgment, and saving as much as possible for the children born to them. The court held that the estate taken was only for life.

In Sill v. White, 62 Conn. 430 (1890), in which the testatrix gave to A all her property for life, with a right to use whatever was necessary for his support, and the remainder over, the life estate was not enlarged into a fee, the court saying there was no rule of law which converted a life estate, expressly created, into a fee absolute or qualified, or into any other form of estate greater than a life estate, by reason of there being coupled with it a power of sale.

The case of Smith v. Bell, 6 Peters, 68 (1843), in the United States Supreme Court, the opinion being by Chief Justice Marshall, is a good illustration of the third of these principles. The provisions of the will were as follows: "I give to my wife all my personal estate, wherever and whatsoever, and of what nature and kind soever, after payment of my debts, legacies, and funeral expenses, which personal estate I give and bequeath unto my said wife Elizabeth Goodwin, to and for her own use and disposal absolutely," the remainder after her decease to be for the use of Jesse Goodwin, the son of the testator. Held, that wife took a life estate and the son a vested remainder in the personalty.

The decision was vested on the ground that the intention of the testator was to make a present provision for his wife, and a future provision for his son.

In Chase v. Ladd, 153 Mass. 126 (1891), the testator devised all his property to his wife, to her own use and behoof forever, but provided that if any of such property should not be expended for her support and maintenance during her lifetime, it should be disposed of in the manner designated in the will. The court decided that such a provision only vested a life estate in the wife. The case shows that although almost unlimited control may be given over property, it does not vest a fee-simple.

The courts in deciding all these cases have always used the intention of the testator as the polar star to direct their interpretation. But none of the cases so decided, except the last, correspond in any great degree with the case under discussion. In the present case there is no express limitation of a life estate. Neither is there any express grant of a fee, as in Church v. Harris, *supra*. Following the language of the devise up to the words "to be used and appropriated by her," the effect is undoubtedly to give an absolute estate. But, when the testator adds "as much as she may wish for her happiness,"—the intention to limit the grant to a life estate begins to manifest itself, and the subsequent words of the will only make that intent more clear.

Accordingly the decision seems to be in accord with the established principles governing such cases.—*American Law Register & Review.*

BOOKS RECEIVED.

A Treatise on the Law of Personal Property. By James Schouler, LL.D. Professor in the Boston University Law School, and Author of Treatises on "The Domestic Relations," "Bailments, including Carriers," "Executors" and "Wills." Third Edition. In Two Volumes. Boston: Little, Brown & Co., 1896.

HUMORS OF THE LAW.

Lawyer.—You say the prisoner stole your watch. What distinguishing feature was there about the watch?"

Witness.—It had my sweetheart's picture in it.

Lawyer.—Oh, I see. A woman in the case.

An Irish judge tells the following story of one of the juries in the south of Ireland, where he was trying a case. The usher of the court proclaimed, with due solemnity, the usual formula: "Gentlemen of the jury, take your proper places in the court!" whereupon seven of them, instinctively, walked into the dock.

Finale to a Criminal Lawyer's Plea.—And I beg you to bear in mind, gentlemen of the jury, that the defendant was fairly urged to take possession of the spoons, since they bore this inscription: "Remember me."—*Fliegende Blaetter.*

Lawyer—"I now offer in evidence a photograph of the plaintiff's broken heart, taken by the Roentgen process."

Judge—"Admitted. Let it be marked, 'Exhibit X.'"—*Puck.*

C, a young lawyer in northwest Texas and a vigorous prosecuting attorney, had convicted a man of murder, who had appealed his case to the court of appeals. C followed the case and represented it in that court. It was his first appearance there, and he was naturally very much embarrassed. Frequent interruptions by one of the judges, with questions and suggestions added to his embarrassment. The judge seeing his embarrassment said to him, "my young friend, go on with your argument—don't be embarrassed—be perfectly free and deport yourself just as if you were before a justice's court in the panhandle." The young lawyer replied, "Your Honor I can't do that—if I were before a justice's court there and were interrupted as I am here I would say, "shut up your infernal mouth until I get through with my argument."

A Kentucky court in a late case says: "While a man who marries a widow with eight infant children assumes a great responsibility, yet we think the honeymoon at least, should be over before he qualifies as the guardian of his wife's infant children and seeks the aid of a court to sell their home for their maintenance and education."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ASSIGNMENT FOR CREDITORS—What Constitutes.—Where an insolvent partnership executed and delivered to several of its creditors mortgages upon its assets, and also executed and delivered to these and other creditors, as collateral security for their claims, an assignment of the choses in action belonging to the partnership, these mortgages and the latter instrument, whether taken singly or collectively, did not constitute such an assignment as rendered the assignment acts of 1881 and 1885 applicable, there being nothing in any of these instruments creating a trust in favor of the debtors or anyone else, and the only persons deriving any benefit therefrom being those to whom the instruments were given.—FULTON V. GIBIAN, Ga., 25 S. E. Rep. 431.

2. APPEAL—Bond — Filing New Undertaking.—Code Civ. Proc. 954, providing that no appeal shall be dismissed for insufficiency of the undertaking if a sufficient undertaking be filed before the hearing of the motion to dismiss authorizes in case two appeals are taken in the same case, and only one undertaking, reciting the taking of the two appeals, and providing for the payment of all costs and damages on either appeal, is given, the filing of a sufficient undertaking.—SPRECKLES V. SPRECKLES, Cal., 45 Pac. Rep. 1022.

3. ADMINISTRATION — Family Allowance.—On appeal from an order making an allowance, under Code Civ. Proc. § 1466, for support of the widow during administration of the deceased husband's estate, it appeared that deceased had devised to her a life estate in certain land, and that she had received a certain amount from sale of said life estate; and the appellate court, speaking with reference to the money thus derived, said that an allowance should be made to her without regard to her having separate property sufficient for her support: Held, that it was the law of the case that such money could not be considered in making the allowance to her. Temple and Henshaw, JJ., dissenting, on the ground that it appeared on the first appeal that she derived her money from a sale of her life estate, subject to administration, and that on the second appeal it appeared that she received it through a partial distribution of the estate.—IN RE LUX'S ESTATE, Cal., 45 Pac. Rep. 1023.

4. ADMINISTRATION — Gifts Causa Mortis.—On an issue as to whether a testatrix died intestate as to certain bank stock and a certain mortgage, not included in her will, the executor testified that the bank stock, at her death, stood in his name, as agent, and that the testatrix gave it to him; a devisee testified that the testatrix, shortly before her death, gave it to her; the mortgagor testified that the testatrix surrendered the mortgage to her before her death (and this statement was corroborated by the executor); while the same devisee that claimed the bank stock testified that the testatrix also gave her the mortgage: Held, that gifts *causa mortis* were not shown, and that testatrix, therefore, as to this property, died intestate.—BROMBERG V. BATES, Ala., 20 South. Rep. 786.

5. ADMINISTRATION—Payments — Family Allowance.—The payments by executors to testator's widow for a family allowance were without a previous order of court does not deprive them of a right to credit therefor to the extent that the court may find that they were reasonable and proper.—IN RE LUX'S ESTATE, Cal., 45 Pac. Rep. 1028.

6. ADMIRALTY — Shipping — Limitation of Suit.—A provision in the shipping receipts that all claims against "the steamship company or any of its stockholders" for damage to goods must be presented within 30 days from the date thereof, as a condition precedent to maintaining a suit against such company of stockholders, does not apply to a suit *in rem* against the ship.—THE QUEEN OF THE PACIFIC, U. S. D. C. (Cal.), 75 Fed. Rep. 74.

7. CARRIERS — Goods — Concealment of Value.—The silence of a shipper touching the character and value of goods, contained in a package which does not indicate that its contents are of great or unusual value, or such an imperfect description of such contents as misleads the carrier with respect to their nature and value, may, when the circumstances require a full disclosure from the shipper, even in the absence of an inquiry by the carrier, or of an actual intent to defraud by the shipper, amount to such a fraud as will discharge the carrier from liability on account of loss or destruction of the goods.—SOUTHERN EXP. CO. V. WOOD, Ga., 25 S. E. Rep. 436.

8. CERTIORARI — New Trials — Power to Grant.—The writ of *certiorari* lies from all inferior judicatories, but the power to grant new trials is confined to the superior courts and the city courts specified in and described by paragraph 5, § 4, art. 6, of the constitution of this State.—STEWART V. STATE, Ga., 25 S. E. Rep. 424.

9. CONVERSION—Title — Stock Held in Trust.—Where stock is transferred to a trustee under a contract by which he agrees to hold and vote it for the benefit of two other persons and himself, jointly, the manner of voting, in case of disagreement, to be settled by arbitration, and to dispose of it when and as agreed upon by himself and one of the other parties, such other parties have no such title or right of possession of the stock as would give either of them a right to bring an action against the trustee for conversion upon his refusal to transfer to such party a third of the stock, nor can any incidental expressions in the contract, consistent with or indicating a different title, extend the title beyond what is clearly stated.—LOUISVILLE TRUST CO. V. STOCKTON, U. S. C. C. OF APP., 75 Fed. Rep. 62.

10. CORPORATION—Insolvent Corporation—Receiver.—Even if the directors of an insolvent corporation, after advancing money to it, and accepting for the same preferred stock of the company, subsequently unlawfully canceled this stock, and issued to themselves promissory notes of the company for the amounts severally advanced by each, and sought to collect the same by suit, these facts are insufficient to authorize a court of equity, upon the petition of a stockholder, to appoint a receiver to take charge of the assets and franchises of the corporation. In such case the plaintiff can be fully protected as to all of his rights in the premises by a proper injunction, such as was granted in the present case, and to which there was no exception.—EMPIRE HOTEL CO. V. MAIN, Ga., 25 S. E. Rep. 413.

11. CRIMINAL LAW—Embezzlement—Evidence.—On a trial for embezzlement, it appeared that defendant was the treasurer and manager of a loan company, which sold to one of its clients, for value, a mortgage indorsing the note without recourse, but not assigning the mortgage, as was its custom, and guarantied principal and interest; that defendant, in August, 1894, receiving notice from authorized parties that they desired to pay off the mortgage, without disclosing this fact, wrote the client to send the papers "for collection," stating that the company wished to present them on maturity for payment, and, on receiving them, returned the company receipt, reciting that they were received "for collection;" that the mortgage was paid to the company by these parties, and the proceeds deposited by defendant in a bank to the general account of the company, on which it drew for payment of its general expenses; that defendant subsequently wrote the client that the mortgagor had failed

to pay on maturity, but promised to pay soon, and subsequently forwarded partial payments, stated to have been made by the mortgagor; that the same method was pursued as to other collections; that the client was not acquainted with the company's methods of transacting business; that defendant knew when the mortgage was paid that the company was insolvent: Held, that a conviction was proper.—COMMONWEALTH v. MOORE, Mass., 44 N. E. Rep. 612.

12. CRIMINAL LAW—Failure to Caution Witness.—The failure of the court to caution a witness that he need not answer a question if the answer would tend to criminate him, is not cause for setting aside a verdict against one upon whose trial for a crime this witness testified.—DUNN v. STATE, Ga., 25 S. E. Rep. 448.

13. CRIMINAL PRACTICE — Assault — Pleading and Proof.—The State is not bound to prove the commission of the offense charged in an indictment on the precise date alleged therein, but may prove its commission on any day within the statute of limitations. —BRYANT v. STATE, Ga., 25 S. E. Rep. 450.

14. DEED—Cancellation — False Representations.—Deeds by a widow without children to one who for many years had lived in her family as her daughter will not be set aside on the ground that those who took her acknowledgments thereto, as well as the one who drew her second will (a different person in each case), represented to her that such papers were merely relative to the will" which she had first made, by which she gave two lots to such daughter, her statement being denied by several witnesses, and contradicted by statements made by her to various persons; and all the property covered by the deeds, as well as other property, being given to such daughter by the second will, which was executed after the deeds, and also gave certain property to sisters of the widow.—KNACK v. USHER, N. J., 35 Atl. Rep. 389.

15. DEEDS—Want of Capacity—Fraud.—Deeds from a father, joined in by his wife, to two of his eleven children, of vacant lots, amounting to 4 per cent. of his estate, will not be set aside on the ground that he was incapacitated from paresis (though he was not declared to be insane till five years thereafter), and that he was induced by fraud to execute the deed; the transaction having been open and known by the others at the time, and the evidence *pro* and *con* as to his capacity not being such that complainants can be said to have sustained the burden of proof.—HOPPER v. HOPPER, N. J., 35 Atl. Rep. 400.

16. EMINENT DOMAIN — Compensation. — Where three blocks are used in connection with an elevator, for one common purpose and as one property, and the elevator cannot be operated successfully without the use of all of the blocks, two of which are used for storing cars, in estimating the damages for the appropriation of a portion of one block for the right of way for a railway, it is proper to estimate the damages to the property as a whole, though the blocks are separated by streets across which the owner has laid tracks without permission of the city.—UNION ELEVATOR CO. v. KANSAS CITY SUBURBAN BELT RY. CO., Mo., 36 S. W. Rep. 1071.

17. EMINENT DOMAIN—Statute Authorizing—Constitutionality.—A statute providing for the condemnation of land for public use, which authorizes the assessment of damages as of the date of the formal taking, but postpones interest till actual possession is taken, and which provides for interest at less than the legal rate, is not unconstitutional, as not allowing, as required by Const., pt. 1, art. 10, a "reasonable compensation."—NORCROSS v. CITY OF CAMBRIDGE, Mass., 44 N. E. Rep. 615.

18. EQUITY—Accounting—Cross Bill.—Where the object of a bill in equity is to secure an accounting of a terminated agency, the agreement for which agency contemplated that the agent should be paid for his services, it is proper for the defendant agent, by cross bill, to demand payment for his services, and have such demand adjusted with the accounting, so that by its decree the court may give complete relief between the parties, in respect of the agency.—HUTCHINSON v. VAN VOORHIS, N. J., 35 Atl. Rep. 371.

19. EVIDENCE—Construction of Contract.—In an action to recover the price of a machine which the seller, by the contract of sale, guaranteed to do as good work as any other machine in the market, evidence to show that it was more expensive in operation than other similar machine was pertinent and admissible. —VERMONT FARM MACH. CO. v. BATCHELDER, Vt., 35 Atl. Rep. 378.

20. EVIDENCE—Injuries—Exclamations of Pain.—Exclamations or complaints made by a person undergoing physical examination by a physician, with a view to ascertaining the extent of his alleged injuries, and apparently made in response to manipulations of the person's body or members by the physician, are admissible in evidence, though such person was not under the treatment of this particular physician, and the examination was being made solely for the purpose indicated. Whether or not the exclamations were involuntary, or the complaints were *bona fide*, is for determination by the jury, under all the evidence submitted.—BROYLES v. PRISOCK, Ga., 25 S. E. Rep. 389.

21. EVIDENCE—Parol Evidence.—Where the only objection to the admissibility in evidence of a written contract between the plaintiff and the defendant was, in effect, that, under the limitation as to time therein expressed, it had expired, and was no longer operative as to the matter in controversy between the parties, and the defendant, in whose behalf it was tendered in evidence, offered to prove "that the terms of the contract had been extended by parol" so as to cover and embrace that matter, this objection should not have been sustained without allowing the defendant an opportunity to show that the contract had in fact been so extended, no question under the statute of frauds being involved.—SAVANNAH, F. & W. RY. CO. v. WIDEMAN, Ga., 25 S. E. Rep. 400.

22. EXECUTION FOR TAXES—Interest.—In view of the act of November 11, 1889 (Acts 1889, p. 31), prescribing that all executions for taxes due the State or any county thereof shall bear interest at the rate of 7 per cent. per annum from the time fixed by law for issuing the same, tax executions against railroad companies bear that rate of interest, and the law is applicable even as to taxes accruing and becoming due while the property of such companies is in the hands of a receiver. Such interest is not in the nature of a penalty. —SPARKS v. LOWNDES COUNTY, Ga., 25 S. E. Rep. 427.

23. FEDERAL AND STATE COURTS—Discovery—Production of Books.—Although the practice which prevails in the highest courts of the State obtains in the federal courts, yet, where congress has legislated upon a matter of practice, such legislation becomes the sole and supreme guide, to the exclusion of the State code. Where, therefore, a party moved for examination of books and papers before trial, both under section 157 of the New Jersey practice act and section 724, Rev. St. U. S. Held, that section 724, Rev. St. U. S., alone controlled the practice as to discovery of books and papers in the federal courts.—UNITED STATES v. NATIONAL LEAD CO., U. S. C. C. (N. J.), 75 Fed. Rep. 94.

24. FEDERAL COURTS—Circuit Courts—Jurisdiction.—When a United States circuit court has jurisdiction, generally, of a controversy, by reason of the parties being citizens of different States, it can entertain a suit for the foreclosure of a mortgage on land within the district for which it sits, and, in such suit, can entertain and determine such pertinent questions as are necessary to give the complainant perfect and full relief, including the question of the superiority of an alleged prior mortgage held by a defendant, although neither complainant nor all the defendants are residents of the district.—KUHN v. MORRISON, U. S. C. C. (Ga.), 75 Fed. Rep. 81.

25. FEDERAL COURT—Jurisdiction—Federal Question. —A suit brought in pursuance of Rev. St. § 2326, and based upon an adverse claim made upon the filing of

an application for a patent for mining ground, is a suit arising under the laws of the United States.—BUTTER v. SHOSHONE MIN. CO., U. S. C. C. (Idaho), 75 Fed. Rep. 37.

26. HUSBAND AND WIFE—Community Property—California Statutes.—In California a husband has absolute power, during his life-time, to sell or mortgage the community property; and the interests of all who claim under or through him, or by reason of his death, including the interest of his wife, are bound by a disposition so made by him.—HEARFIELD v. BRIDGES, U. S. C. C. of App., 75 Fed. Rep. 47.

27. INSURANCE—Cancellation—Agency.—After plaintiff had obtained insurance through H, an insurance broker, the agents of the insurance companies notified H to return the policies for cancellation. Thereupon H wrote to plaintiff to return them, saying that he was unable to hold them at the rate at which they had been issued, and that the companies had ordered them to be returned for cancellation. Plaintiff sent them to H, who delivered them to the companies, and they were canceled: Held, that H was not made the agent of the companies by the application to him to return the policies, but that he was specially authorized by plaintiff to cancel the policies, and that the validity of the cancellation was not affected by any mistake or misrepresentation of his concerning directions from the companies, or by his neglect of any duty to reinsure.—PARKER & YOUNG MANUFG. CO. v. EXCHANGE FIRE INS. CO., Mass., 44 N. E. Rep. 614.

28. INSURANCE — Construction of Policy. — Without sacrificing the substantial limitations imposed upon the liability of an insurer by the contract between the parties, stipulations and conditions in policies of insurance, like those in all other contracts, are to have a reasonable intendment, and are to be so construed, if possible, as to avoid forfeitures, and to advance the beneficial purposes intended to be accomplished.—CLAY v. PHOENIX INS. CO., Ga., 25 S. E. Rep. 417.

29. INSURANCE — Waiver of Breach of Conditions.—Where a policy of fire insurance contained stipulations or conditions reciting that, unless such and such things were true, the policy was to be void, and the declaration in an action thereon showed affirmatively that one or more of these things was not true, it was demurrable, but was saved by an amendment alleging in substance that the company's agent by whom the policy was delivered to the insured knew at and before the time of making the delivery all the facts to which such stipulations or conditions related, and that consequently the company waived the benefit of the same. In such case it was, of course, incumbent upon the plaintiff to prove the waiver as alleged.—MECHANICS' & TRADERS' INS. CO. OF NEW ORLEANS v. MUTUAL REAL ESTATE & BUILDING ASSN., Ga., 25 S. E. Rep. 457.

30. JUDGMENT — Assignment — Death of Assignor.—Where a judgment is rendered in favor of several persons, and said judgment is assigned by the owners thereof, and, after such assignment, one of the original owners of said judgment dies, no proceedings are necessary for any revivor of the judgment in the name of the legal representatives of the deceased person; and any further proceedings in the actions may be maintained in the name of the assignee of said judgment, an order of substitution being first made by the court in which proceedings may be pending.—WEAVER v. LOCK, Kan., 45 Pac. Rep. 1039.

31. MANDAMUS—Act of Municipal Officer.—*Mandamus* will not lie to compel the disbursing officer of a municipal corporation to pay out public funds in open disobedience of a restraining order made by a court of competent jurisdiction.—WILMARTH v. RITSCHLAG, S. Dak., 68 N. W. Rep. 312.

32. MANDAMUS—To Amend Record of Justice.—A writ of *mandamus* will not be granted to compel an inferior court to amend its record where the amendment will avail nothing to the applicant.—KENDALL v. ALDRICH, Vt., 35 Atl. Rep. 429.

33. MARRIED WOMAN — Goods Sold. — The mere fact that a wife got the benefit of goods bought by her husband on his own credit would not, whether he was solvent or insolvent, make her liable in law to the seller for the price of such goods.—HIGHTOWER v. WALKER, Ga., 25 S. E. Rep. 386.

34. MORTGAGE—Duplicate Instruments.—A mortgage was executed by one H, as agent for a corporation, but not under its corporate seal. A question as to the validity of the mortgage and of the authority of the agent having arisen, another mortgage was executed, two months later, by the officers of the corporation, which was substantially the same as the one first executed. There were no intervening equities: Held, that the two mortgages were properly foreclosed as one, under a bill seeking foreclosure of the second.—ROBINSON v. PIEDMONT MARBLE CO., U. S. C. C. (Ga.), 75 Fed. Rep. 91.

35. MORTGAGE — Foreclosure — Junior Lienor.—In an action to foreclose a real estate mortgage on property on which a county has a junior lien, by virtue of taxes assessed upon the personal property of the mortgagor, defendant county's answer, alleging payment and cancellation of the note, and that the mortgage has been kept outstanding in order to defeat the lien of the county for its personal property tax, states a good defense; and a further allegation that the mortgage was kept outstanding in order to defraud the minor heirs of the intestate mortgagor may be treated as surplusage.—MCGILLIVRAY v. MCGILLIVRAY, S. Dak., 68 N. W. Rep. 316.

36. MUNICIPAL CORPORATIONS—Control by Legislature.—The legislature of California is not restrained by § 6, art. 11, of the constitution of that State, adopted in 1879, from exercising control, by general laws, over municipal corporations, created prior to its adoption, but only from passing special laws affecting such corporations.—HUNTINGTON v. CITY OF NEVADA, U. S. C. C. (Cal.), 75 Fed. Rep. 60.

37. NEGLIGENCE—Notice.—Plaintiff was injured in an accident caused by a telegraph wire which had been allowed by the company owning it to remain for more than two months sagging across, and within two feet of the surface of, the highway: Held, that he was not precluded from recovering damages because neither he nor any one else had notified the telegraph company of the condition of the wire.—WESTERN UNION TEL. CO. v. ENGLER, U. S. C. C. of App., 75 Fed. Rep. 102.

38. NEGLIGENCE—Dangerous Premises.—The declaration, as amended, alleging in substance that the plaintiff suffered personal injuries because of the defective and dangerous condition of certain steps attached to a storehouse belonging to the defendants, which they had rented to another; that the plaintiff, when injured, was using these steps in the due course of his business with the tenant; that the steps constituted a platform used in common with other storehouses belonging to and occupied by the defendants; and that the defective and dangerous condition of the steps was well known to the defendants, and they had sufficient opportunity to have the same repaired, but had neglected to do so, a cause of action was set forth, and it was error to dismiss the case on general demurrer.—ARCHER v. BLALOCK, Ga., 25 S. E. Rep. 391.

39. NUISANCE—Matter of Taste.—That a cemetery lot "was unsightly and disfigured, and needed to be filled and graded to put it in proper and suitable condition," does not warrant its being declared a nuisance.—WOODSTOCK BURIAL GROUND ASSN. v. HAGER, Vt., 35 Atl. Rep. 431.

40. PARTNERSHIP — Priorities of Liens.— A father, knowing that a partnership which his son was to enter with another would require several thousand dollars capital, promised to lend them $2,000 and, after the partnership was formed, advanced that amount, and took his son's individual notes therefor, payable in long time, and, on maturity, took renewal notes of his son individually. The son, who kept the firm books, credited the advances as payments on his share of the

capital: Held, that the advances were to the son individually, and not to the firm.—BOICE v. CONOVER, N. J., 35 Atl. Rep. 402.

41. PARTNERSHIP—Subletting of Apartments.—Where a contract of partnership has for its business purpose the subletting of furnished apartments for purposes of prostitution, in direct violation of Pen. Code, § 316, its illegality is not cured by the facts that the copartnership, and the individual members thereof, are not participants, in any manner, in the business of prostitution, and that the tenements are located in a section of the city mainly inhabited by prostitutes, who are permitted to remain there by the police authorities.—CHATEAU v. SINGLA, Cal., 45 Pac. Rep. 1015.

42. PUBLIC LANDS—Grant to Railroad Company.—The facts that a tract of land is claimed as part of a Mexican grant confirmed by the United States, and that a survey under the authority of the government has included the tract within the limits thereof, exclude such tract from the category of public land, and so from the operation of a grant by congress to a railroad company, although it is ultimately decided, in a proceeding pending at the time of the congressional grant, that the land in question is not within the limits of the Mexican grant.—SOUTHERN PAC. R. CO. v. BROWN, U. S. C. C. of App., 75 Fed. Rep. 85.

43. RAILROAD COMPANIES—Appointment of Receivers.—The appointment of railroad receivers under a bill by a stockholder and bondholder, which makes no mortgagee a party, and which alleges insolvency, and prays merely that the system may be protected from its creditors, and held intact, may, in the absence of formal objection, be presumed to be for the common interest; but, until the mortgage bondholders intervene, such receivers stand practically for the corporation itself, with all its rights and powers, subject to such limitations and directions as the court may give.—NEW ENGLAND R. CO. v. CARNEIGIE STEEL CO., U. S. C. C. of App., 75 Fed. Rep. 54.

44. RAILROAD COMPANIES—Fires Set by Locomotive.—There being evidence from which the jury might have inferred that the plaintiff's woods were burned by a fire originating from sparks which escaped from a locomotive operated by a servant of the defendant, and ignited straw and other combustible material on the railroad right of way, and that the fire thus started burned continuously until it reached the plaintiff's land, it was error to grant a nonsuit.—BROWN v. BENSON, Ga., 25 S. E. Rep. 455.

45. REMOVAL OF CAUSES—Receiver of Federal Court.—A receiver appointed by a federal court has not a right, by virtue of his personal standing as such, to remove from a State to a federal court a suit in which he is joined as defendant with a citizen of the State.—SHEARING v. TRUMBULL, U. S. C. C. (Colo.), 75 Fed. Rep. 33.

46. REMOVAL OF CAUSES — Separable Controversy.—Where an application is made, under State laws, to condemn a portion of a large tract of land, the whole of which is owned in fee by a defendant, who is a citizen of another State than the applicant's and a small part of which, including some of the land sought to be condemned, has been leased by him to another defendant who is a citizen of the same State as the applicant, there is a separable controversy between the applicant and such first named defendant as to the land not leased, which can be removed to a federal court, on the ground of diverse citizenship.—SUGAR CREEK, P. B. & P. C. R. CO. v. MCKELL, U. S. C. C. (W. Va.), 75 Fed. Rep. 34.

47. SALE—Price Payable in Goods.—On breach by a vendee of a contract of sale providing for payment in specified goods, to be delivered on order from the vendor, by failure to deliver part of the goods when ordered, the balance of the price becomes payable in money.—SMITH v. COOLIDGE, Vt., 35 Atl. Rep. 432.

48. TRIAL—Nonsuit.—To warrant a nonsuit, it is not enough that the facts are without dispute. The inference that is drawn from such facts must likewise be, in a legal sense, indubious, *i. e.*, one about which reasonable men may not honestly differ.—NEW JERSEY SCHOOL & CHURCH FURNITURE CO. v. BOARD OF EDUCATION OF SOMERVILLE, N. J., 35 Atl. Rep. 397.

49. TRUST—Charities—Bequest—Termination.—Where a testator bequeathed to an incorporated school and its successors a fund in trust, the income to be used for the education of poor children in its district, the abandonment of the school and diversion of the fund did not terminate the trust.—GREEN v. BLACKWELL, N. J., 35 Atl. Rep. 375.

50. VENDOR AND PURCHASER—Sale of Land—Rescission.—No legal right of rescission can arise in favor of the holder of land under a bond for title until after a breach of the bond by the obligor.—SANDERLIN v. WILLIS, Ga., 25 S. E. Rep. 437.

51. VENDOR AND PURCHASER—Sufficiency of Title.—Where a purchase contract gives the vendee 30 days for examination of title, provides for a deposit, and its return if title proves invalid, without specifying the time within which the conveyance is to be made, an unrecorded contract for sale of lands, of which the vendee has no notice, between a vendor and a third person, existing when the contract was made, and which, by mistake, included the same land, is a defect which will render the title invalid, and entitle the vendee to recover the deposit if the vendor fails within a reasonable time to remove the defect.—BARTLETT v. MCGEE, Cal., 45 Pac. Rep. 1029.

52. WATERS AND WATER COURSES—Statute Authorizing Taking.—St. 1875, ch. 217, authorizes the city of Taunton to take water from a pond, provided that a dam shall be built, where it flows into N river, sufficient in height to retain sufficient water for one year's supply for the city, and that the "natural flow" of the pond into N river shall at all time be maintained: Held, that the expression "natural flow" means the quantity of water ordinarily flowing in the stream at times when its volume is not increased by unusual freshets or rains.—NEMASKET MILLS v. CITY OF TAUNTON, Mass., 44 N. E. Rep. 609.

53. WILL—Omission of Devisee—Legal Presumption.—The presumption raised by the statute that the omission by a testator to provide for a child was not intentional may be rebutted by extrinsic evidence, whether of declarations of the testator or collateral facts.—IN RE ATWOOD'S ESTATE, Utah, 45 Pac. Rep. 1036.

54. WILLS—Capacity to Make—Inebriety.—Inebriety, though long continued, and resulting occasionally in temporary insanity, does not require proof of lucid intervals, to give validity to the acts of the drunkard, as is required where general insanity is proved. Consequently, where habitual intoxication is shown, there will be no presumption that incapacitating drunkenness existed at the time of making the will.—KOEGEL v. EGNER, N. J., 35 Atl. Rep. 394.

55. WILLS—Construction.—Under a will bequeathing $2,000 to each of testator's daughters, and thereafter giving to his son his interest in a firm business, the interest in the firm personalty so given to the son is not liable to be applied to payment of the legacies to the daughters.—MEIS v. MEIS, N. J., 35 Atl. Rep. 369.

56. WILLS—Devisees — Execution of Trust.—Where, by will, property was bequeathed and devised to named trustees for the sole and separate use of a daughter of the testator for life, which property at her death was to vest absolutely in fee-simple in such child or children as she might have then living, and the will conferred upon the trustees large powers as to making sales of the trust property and reinvesting the proceeds thereof, and also the power to use the *corpus* of the estate for certain specified purposes, the trust created by the will was for the benefit of those entitled to take in remainder, as well as for the life tenant, although the trustee was not invested with the legal title to the estate in remainder, beyond what was involved in the execution of those powers.—HENDERSON v. WILLIAMS, Ga., 25 S. E. Rep. 395.